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Report on

Breach of Promise of Marriage

LAW REFORM COMMISSION OF BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL

LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON BREACH OF PROMISE OF MARRIAGE

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To the Honourable Brian Smith, Q.C.
Attorney General of the Province of British Columbia:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON
BREACH OF PROMISE OF MARRIAGE

A broken promise to marry is attended by many of the consequences of a breach of a commercial contract. The extent to which it is necessary or desirable for the law to provide remedies upon the end of an engagement is the subject of this Report.

A. Introduction

It would probably surprise many people who become engaged to learn that their agreement to marry is regarded by the law as a legally binding contract. If one party suffers a change of heart and wishes to withdraw from the engagement, he does so only at the risk of being liable for damages in an action for breach of promise of marriage.[1]

At common law, the general remedy for a breach of contract is a monetary award of damages designed either to encourage a person to keep to his bargain or to compensate a wronged party for damages flowing from a breach of it. The continued usefulness may be questioned of an action which either encourages people to enter into ill-considered marriages or compensates the wronged party for having been denied what would have been, in all probability, an unhappy marriage. It may also be doubted whether the law of damages, developed primarily in a commercial context, should apply to such an intimate social relationship. In particular, the possibility of such an action being used by the jilted party for blackmail or revenge cannot be dismissed.

The origin of the action for breach of promise of marriage can be traced to the ecclesiastical courts, which exercised a jurisdiction to order specific performance of promises to marry.[2] Later the action was held maintainable in courts of common law which, possessing no equitable jurisdiction to compel specific performance, treated it as contractual for which the proper remedy was damages.[3] The action could be maintained by a man as well as a woman.[4]

Until the early part of the 20th century, marriage was the usual option available to a young woman of the middle or upper classes. If she were jilted, her chances of marrying were virtually ruined since it was assumed that no honourable man would break his engagement unless his fiancée possessed grave defects of character. Ending an engagement was scandalous for both parties. To protect the young woman's reputation, it was necessary to establish that her fiancé was at fault for terminating the engagement. Given this attitude, there was generally little possibility of a private settlement of the matter, whatever the wishes of the man or his desire to settle privately might have

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[1] Gilbert & Sullivan in their operetta *Trial by Jury*, satirize an action for breach of promise and in singularly apt language, sung by the defendant, Edwin, to the jury, underscore this point:

> Oh, gentlemen, listen I pray
> Though I own that my heart has been ranging,
> Of nature the laws I obey,
> For nature is constantly changing.
> The moon in her phases is found,
> The time and the wind and the weather,
> The months in succession come round,
> And you don't find two Mondays together.
> Ah! Consider the moral I pray,
> Nor bring a young fellow to sorrow,
> Who loves this young lady to-day,
> And loves that young lady to-morrow.

[2] At least from the twelfth century: Feinsinger, "Legislative Attack on "Heart Balm"," (1935) 33 Michigan Law Review 979 at 980. The order appears to have been in the form "Sentence for matrimony, commanding solemnization, cohabitation, consummation, and tractation, as becometh man and wife to have." *See Cohen* v. *Sellar*, [1926] 1 K.B. 536, *per* McCardie, J., at 543-544. This power to compel formal solemnization was only used, however, where the parties had already exchanged words amounting to a form of marriage recognized by canon law: *Matrimonium per verbis de praesenti*, J. Dundas White, "Breach of Promise of Marriage," (1894) 10 L.Q.R. 135 at 136. In other cases, the guilty party could receive an admonition, or warning from the court, on refusing to carry out his promise: *supra*; *see also Cohen* v. *Sellar*, *supra*, at 543-544. One writer has suggested that at that time such a threat was sufficient to bring about the marriage. Brockelbank, "The Nature of the Promise to Marry—A Study in Comparative Law," (1946) 41 Illinois L.R. 1, 3. The ecclesiastical courts did recognize a wide range of defences, however: *Cohen* v. *Sellar*, *supra*. *And see* Feinsinger, *supra*, at 982. Their power to enforce promises of marriage was eventually removed in 1753: *Lord Hardwicke's Act*, 26 Geo. II, c. 33, s. 13.

[3] *Stretch* v. *Parker*, (1638) Mich. 12 Cor. Rot. 21, 1 Ro. Abr. 22; *Applethwaite* v. *Northy*, (1591) Cro. Eliz. 229, 78 E.R. 485; *Holcroft* v. *Dickenson*, (1672) Carter 233, 124 E.R. 933.

[4] *Harrison* v. *Cage et ux.*, (1697-98) Carthew 467, 90 E.R.870.

been. Moreover, even where a private settlement was possible, the man, in addition to paying monetary compensation, was often required as a term of the settlement to sign a confession absolving his fiancée of all blame, acknowledging his total responsibility and forfeiting the right to be called a gentleman. These confessions could be used as the jilted party desired. Often that meant publication in widely circulated newspapers or journals.

Today, the withdrawal of one party from an engagement is not attended by such drastic social consequences. Marriage is not the only future for most women. The "marriageability" of a woman is probably not impaired by a prior broken promise to marry. While injured feelings may be the natural result of a unilateral withdrawal from an engagement to marry, it has been questioned whether the law should compensate someone for those feelings. That practice has been criticized for many years by the courts, legal commentators and law reform agencies.[5] The action for breach of promise of marriage has been abolished in several jurisdictions.[6] There are, of course, cases where the law should provide remedies when a promise to marry is broken, particularly where property has been settled by one party upon another in expectation of the marriage, or one party has intentionally taken advantage of another. Whether the law provides adequate redress in those kinds of cases is a question which we will examine in this Report.

That the action for breach of promise of marriage occupies an anomalous position in the present law of British Columbia is hard to dispute. As Taylor, J., of the British Columbia Supreme Court observed in a recent case:[7]

> Prior to the enactment in 1968 of the present divorce legislation, the continuation of a marriage was in no way dependent on whether or not it proved congenial. A married woman who observed her obligations was entitled, if she wished, to have the advantages of married status for life, no matter how ill-matched the parties were.
>
> But today the continuation of a marriage depends very much on the compatibility of the parties. An uncongenial union may be brought to an end by either, after an appropriate period of separation. Marriage has become a relationship freely terminable by either side.
>
> Because of changes in the nature of marriage,the action for breach of promise, abolished in the United Kingdom a decade ago, now seems to occupy a somewhat anomalous position in our matrimonial law.

In this Report, we will examine the action for breach of promise of marriage. In Chapter II, we discuss the current law. In Chapter III, we discuss the case for reform. Recommendations for reform are made in Chapter IV.

B. The Working Paper

A Working Paper on Breach of Promise of Marriage was published and circulated widely among academics, lawyers and judges. Very few responses were received, suggesting that our principal proposal that the action for breach of promise of marriage be abolished was not controversial.

Our correspondents raised various matters of detail, which will be addressed in this Report.

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[5] See Chapters III and IV below.

[6] For example, England and Wales, Ireland, Australia, South Australia, New Zealand, Ontario and several of the United States.

[7] *Snowe* v. *Baron*, (1981) 121 D.L.R. (3d) 199, 200, 27 B.C.L.R.25 (B.C.S.C.).

A. Introduction

In this Chapter, we examine the action for breach of promise of marriage and consider the law governing the division of property acquired during an engagement. Because breach of promise is not the only action providing a remedy when one party unilaterally withdraws from an engagement to marry, we will also discuss other causes of action which may be invoked in such a case.

B. The Action for Breach of Promise of Marriage

1. Elements of the Action

A mutual exchange of promises to marry creates a binding contract.[1] The promises need not be in writing.[2] The plaintiff's testimony alone, however, is insufficient to prove that promises were made and must be corroborated.[3] The promises may be express[4] or implied from the circumstances.[5]

A promise to marry may be binding even if conditional. For example, promises to marry have been conditional on getting a good job or finishing one's education,[6] obtaining parental consent,[7] the death of a parent or other relative,[8] settling a relative's estate,[9] converting to another religion,[10] reaching retirement,[11] improving financial prospects and acquiring a home,[12] and finishing the required number of years of service in the R.C.M.P.[13] But the condition must not be contrary to public policy. Courts have refused to enforce a promise to marry conditional on the death of a promisor's spouse,[14] on the

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[1] *Vineall* v. *Veness*, (1865) 4 F. & F. 344, 176 E.R. 593; *Munn* v. *Haahti*, (1925) 37 B.C.R. 71 (B.C.S.C.). The possibility of bringing an action for inducing breach of a contract to marry was recognized in *G.* v. *B. and B.*, [1926] 1 W.W.R. 324, 22 Alta. L.R. 126, [1926] 1 D.L.R. 855 (Alta. S.C.-A.D.), although it was said that family members were allowed a certain amount of privilege in this respect (at 328, 335); *Cohen* v. *Sellar*, [1926] 1 K.B. 536, 543-4. Recently, however, the Saskatchewan Court of Appeal held that an agreement by the parties to continue their relationship "with marriage in view," when the defendant finished her nursing training, did not constitute a binding contract: *Klein* v. *Kaip*, (Unreported) (1981) 12 A.C.W.S. (2d) 482 (Sask. C.A.); In *Munn* v. *Haahti*, *supra*, the exchange of promises between two people who had never met was held to create a contract conditional on the parties' suitability.

[2] *Wozny* v. *Kasky and Vintners Ltd.*, (1954) 12 W.W.R. 441 (B.C.C.A.); *see also*, *Fisher* v. *Graham*, (1880) 31 U.C.C.P. 286 (Ont. C.A.).

[3] *Evidence Act*, R.S.B.C. 1979, c. 116, s. 7(1). "The evidence relied on as corroborative need not go the length of establishing the promise relied on; it is sufficient if it supports the plaintiff's evidence that the promise was made:" *Mott* v. *Trott*, [1943] S.C.R. 256, 261 *per* Kerwin, J.; *see also Cockerill* v. *Harrison*, (1903) 14 Man. R. 366 (C.A.); *Waters* v. *Bellamy*, (1888) 5 Man. R. 246 (C.A.).

[4] *See, e.g., Pavao* v. *Vieira and Belchoir; Belchoir* v. *Vieira*, (1978) 8 R.F.L. (2d) 173 (Man. Q.B.).

[5] On acceptance, *see Daniel* v. *Bowles*, (1826) 2 Car. & P.553, 172 E.R. 251 N.P. (woman did not object at time offer made and later received the man as a suitor); *Hutton* v. *Mansell*, (1705) 6 Mod. Rep. 172, 87 E.R. 928; Holt, 458, 90 E.R. 1152; 3 Salkeld 16, 64, 91 E.R. 664, 693. Circumstances which have been held to imply or corroborate that the parties have agreed to marry include the gift of an engagement ring: *Skipp* v. *Kelly* (1926) 42 T.L.R. 258 (J.C.P.C.); *Le Blanc* v. *Wetmore*, [1944] 2 D.L.R. 130 (N.B.S.C./A.D.); *Andronyk* v. *Cox*, (1982) 38 B.C.L.R. 15 (B.C.S.C.), *per* Wetmore, L.J.S.C.; setting a date for the marriage: *Skipp* v. *Kelly*, *supra*; seeing the minister: *Andronyk* v. *Cox*, *supra*; the parties' conduct towards each other: *Bessela* v. *Stern*, (1877) 2 C.P.D. 265 (C.A.); *Harvey* v. *Johnston*, (1848) 6 C.B. 295, 136 E.R. 1265; *Yarwood* v. *Hart*, (1888) 16 O.R. 23 (C.A.); treating each other the same after the defendant's decree *nisi* and saying on receipt of it, "That's what we've been waiting for:" *Croll* v. *Edgley*, (1963) 41 W.W.R. 439 (B.C.S.C.); entering into a void marriage: *Kaminski* v. *Kaminski*, (1982) 13 A.C.W.S. (2d) 124, Unreported decision of Dixon J., Alberta Queen's Bench, Actions #8001-05863, #8001-21229, Judicial District of Calgary; applying for a marriage licence: *Stuwe* v. *Baron*, (1981) 121 D.L.R. (3d) 199, 27 B.C.L.R.25 (B.C.S.C.); *Andronyk* v. *Cox*, *supra*; and the taking of a fertility test: *Demitri (aka Niemann)* v. *Niemann and Niemann Holdings Ltd.*, (1980) 12 F.L.D. 172 (B.C.S.C.); *see also Barnum* v. *Henry*, (1905) 9 O.L.R. 319.

[6] *Le Blanc* v. *Wetmore*, *ibid.* *McKeown* v. *Van Hoorde*, [1924] 2 D.L.R. 968 (S.C.C.).

[7] *McKeown* v. *Van Hoorde*, *ibid.*

[8] *Frost* v. *Knight*, (1872) L.R. 7 Exch. 111, [1861-73] All E.R. 221, 41 L.J. Ex. 78; *Grant* v. *Cornock*, (1889) 16 O.R. 532; *Atchinson* v. *Baker*, (1796) Peake Add. Cas.103, 124, 170 E.R. 209, 217 (father), *Henderson* v. *Muncey*, [1943] 2 W.W.R. 120, 59 B.C.R. 57 (B.C.S.C.), *aff'd*. [1943] 3 W.W.R. 242, 59 B.C.R. 312.

[9] *Grant* v. *Cornock*, *ibid.*

[10] *Le Blanc* v. *Wetmore*, *supra*, n. 5.

[11] *Tuttle* v. *Swanson*, (1973) 9 R.F.L. 59 (B.C.S.C.).

[12] *Mott* v. *Trott*, *supra*, n. 3; acquiring a home only: *Rowe* v. *Public Trustee*, (1963) 38 D.L.R. (2d) 462 (Ont. H. Ct.).

[13] *Ewart* v. *Tetzlaff*, (1959) 28 W.W.R. 124 (B.C.S.C.).

[14] *Spiers* v. *Hunt*, [1908] 1 K.B. 720; *Wilson* v. *Carnley*, [1908] 1 K.B. 729 C.A.; *Sheehan* v. *Mercantile Trust Co.*, (1919) 46 O.L.R. 581, *rev'g*. 45 O.L.R. 422 (Ont. S.C.-A.D.).

grant of a divorce,[15] or on the grant of a decree of nullity.[16] It was thought such promises might promote infidelity, sexual immorality and possibly crime,[17] and hence were contrary to public policy and unenforceable.[18] The courts have also refused to enforce promises to marry given in exchange for sexual intercourse.[19]

The party who without lawful justification refuses to marry the other party becomes liable in damages. The refusal need not be express; failure to marry at the agreed time or within a reasonable time may constitute breach of promise.[20] Where a date for the marriage ceremony has not been set the court will infer that it is to take place within a reasonable time.[21]

A breach does not automatically arise with the expiration of the time for completion. In *Grant* v. *Cornock*,[22] it was said:[23]

> . . . the mere lapse of the time fixed for the marriage is not necessarily a breach. There must be a refusal, or something equivalent to a refusal, such as marrying another. If persons agree to marry at a certain time, but the time passes and the marriage does not take place, but they continue to act like engaged persons, I think that may go on for any length of time without there being any breach, and if they choose to fix a new day there is nothing to prevent it.

In one comparatively recent case,[24] although the engagement lasted 14 years, no breach was found by the court since, in the circumstances, there had been no refusal to marry.

A refusal can be inferred from conduct.[25] In one case[26] the defendant acquired a marriage licence and then told the plaintiff they were husband and

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[15] *Prevost* v. *Wood*, (1905) 21 T.L.R. 684 (K.B.); *Caulfield* v. *Arnold*, [1925] 1 W.W.R. 664, 34 B.C.R. 404 (B.C.S.C.); *Newton* v. *Newton*, (1975) 19 R.F.L. 276 (Ont. S.C.); *Dobersek* v. *Petrizza*, [1968] N.Z.L.R. 211 (S.C.); but see *Demitri (aka Niemann)* v. *Niemann and Niemann Holdings Ltd.*, *supra*, n. 5., where this factor appears to have been overlooked.

[16] *Siveyer* v. *Allison*, [1935] 2 K.B. 403.

[17] *Per* Phillimore, J. in *Spiers* v. *Hunt*, *supra*, n. 14 at 724; and see also *Wilson* v. *Carnley*, *supra*, n. 14. In the latter case, Farwell, L.J., at 741, noted:

> " . . . in some cases, if the virtue of the woman with whom it was made were strong enough to resist the passions of the man, it might induce him to accelerate the dissolution of the bond which prevented the fulfillment of his desires."

[18] Where the promise has been made between the decree *nisi* and the decree absolute, however, it has been held that the promise is enforceable: *Fender* v. *St. John-Mildmay*, [1938] A.C. 3 (H.L.); *Croll* v. *Edgley*, *supra*, n. 5. Although the marriage is subsisting, no duties are owed between the parties. Similarly, a promise made before the granting of a decree *nisi*, but reaffirmed after, is enforceable. If the plaintiff is unaware of the defendant's marriage, the promise is enforceable upon the death or divorce of the defendant's spouse: *Shaw* v. *Shaw*, [1954] 2 Q.B. 429 (C.A.); *see also Wild* v. *Harris*, (1849) 7 C.B. 999, 137 E.R. 395; *Millward* v. *Littlewood*, (1850) 5 Ex. 775, 155 E.R. 339; *Thomson* v. *McEwen*, [1953] 1 D.L.R. 151 (N.S.S.C.-A.D.). The plaintiff must be the unmarried party: *See Re Spears and Levy et al.*, (1974) 52 D.L.R. (3d) 146 (N.S.S.C.-A.D.) where the plaintiff had been falsely advised by her lawyer that she was divorced; *cf. Croll* v. *Edgley*, *supra*.

[19] *See e.g.*, *Morton* v. *Fenn*, (1783), 3 Dougl. K.B. 211, 99 E.R. 618 and *Brownlee* v. *Partridge*, [1947] 2 W.W.R. 805 (B.C.S.C.), an action brought by a man. See also *Baker* v. *Balderston*, [1937] 1 D.L.R. 736 (Man. C.A.), *reversing*, without written reasons, [1936] 4 D.L.R. 439 (Man.K.B.).

[20] *Cole* v. *Cottingham*, (1837) 8 Car. & P. 75, 173 E.R. 406, *Atchinson* v. *Baker*, *supra*, n. 8.

[21] *Dickie* v. *Curtis*, (1920) 17 O.W.N. 494, *Naujokat* v. *Bratushesky*, [1942] 2 W.W.R. 97 (Sask. C.A.). In British Columbia, a party has six years to bring an action for breach of promise: *Limitation Act*, R.S.B.C.1979, c. 236, s. 3(4); *see Costello* v. *Hunter*, (1887) 12 O.R. 333 (C.A.); Where the breach has been hidden by fraud, *see* s. 6 of the *Limitation Act*.

[22] *Supra*, n. 8.

[23] *Per* MacLennan, J.A. at 541.

[24] *Rowe* v. *Public Trustee*, *supra*, n. 12, *per* Grant, J. at 467:

> It is true that the deceased indicated that they would be married as soon as he was settled . . . Mrs. Rowe gives as her reason for the conclusion that he had abandoned his intention to marry, the fact that he had set no date in the spring of 1958. On the other hand, she apparently made no suggestions as to the date and apparently never spoke to him about the matter again. She acknowledges that Beckitt had never said he would not marry her . . . One is forced to the conclusion that both these parties were delighted to be engaged but that neither of them took any steps to bring about the wedding.

See also McBride v. *Johnson (or McBride)*, [1962] S.C.R.202, 37 W.W.R. 216, 31 D.L.R. (2d) 763; *Mott* v. *Trott*, *supra*, n. 3; *Trott* v. *Mott* (2), [1944] 3 D.L.R. 58 (Ont. C.A.).

[25] *Verhoski* v. *Hunt*, (1960) 67 Man. R. 342 (Man. Q.B.).

[26] *Naujokat* v. *Bratushesky*, *supra*, n. 21 at 110.

wife. Pretending to marry the plaintiff was the equivalent of a refusal.[27] There is some authority that refusal will not be inferred from conduct unless the plaintiff has first requested the defendant to marry.[28]

Breach of promise may occur even if the condition on which a promise is based has not been met or the intended date for the marriage has not passed. Where a clear repudiation of the contract takes place before the time set for completion, the wronged party does not have to wait until that time to sue.[29] The most obvious example of a clear repudiation is where one party marries another and renders himself or herself incapable of fulfilling the contract at a later date.[30] It is not necessary, however, for the repudiation to take such an extreme form. In one instance, the promise was conditional on the death of the defendant's father.[31] While the father was still alive the defendant announced he had no intention of fulfilling his promise. The court allowed the plaintiff to sue immediately.[32]

The repudiation of the promise must be communicated to the promisee.[33] Unless the promisee accepts the repudiation there is no breach of promise.[34] However, the death of the defendant does not itself bar the action.[35]

2. Defences to the Action

Aside from defences common to actions in contract[36] there are certain defences peculiar to the action for breach of the contract to marry.[37]

One defence frequently invoked is that the defendant discovered, after promising to marry, that the female plaintiff was not chaste.[38] The scope of this rule was considered by the Alberta Supreme Court, Appellate Division, in 1926, in the case of *G.* v. *B. and B.*[39] It was held that the defence applied

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[27] For other conduct *see Barnum* v. *Henry*, *supra*, n. 5. Gross misbehaviour has been held not to equal a refusal: *Rose* v. *Chadwick*, (1924) 55 O.L.R. 41 (Ont. S.C.-A.D.). Agreeing to marry but one party indicating he would never cohabit with the other is a breach: *Bellamy* v. *Robertson*, (1915) 8 W.W.R. 305, 21 D.L.R. 415 (Sask. S.C.).

[28] *Gough* v. *Farr*, (1827), 2 Car. & P. 631, 172 E.R. 286; *Caines* v. *Smith*, (1846) 15 M. & W. 189, 153 E.R. 815; *Short* v. *Stone*, (1846) 8 Q.B. 358, 115 E.R. 911.

[29] *Frost* v. *Knight*, *supra*, n. 8; *McKeown* v. *Van Hoorde*, *supra*, n. 6; *Le Blanc* v. *Wetmore*, *supra*, n. 5.

[30] *See*, *e.g.*, *Le Blanc* v. *Wetmore*, *supra*, n. 5 (12 year engagement conditional on changing religion and finding another job).

[31] *Frost* v. *Knight*, *supra*, n. 8.

[32] The plaintiff has the option, however, of waiting until the original time for completion before commencing an action. *Grant* v. *Cornock*, *supra*, n. 8 at 542 *per* MacLennan, J.A.; *Frost* v. *Knight*, *supra*, n. 8 at 112 *per* Cockburn, C.J. for the majority.

[33] *McBride* v. *Johnson (or McBride)*, *supra*, n. 24 at 768 D.L.R. *per* Ritchie, J.

[34] *Ibid.* at 768.

[35] *Davy* v. *Myers*, (1824) Taylor 89 (Ont. C.A.); *Rowe* v. *Public Trustee*, *supra*, n. 12; *Smallman* v. *Moore*, [1948] S.C.R. 295.

[36] For example, fraud, illegality or undue influence, *inter alia*. *see* Baxter, "The contract to marry," (1963) 23 R. du B. 44 at 49; fraudulent misrepresentation, *see Wharton* v. *Lewis*, (1824) 1 Car. & P. 529, 171 E.R. 1303; *Foote* v. *Hayne*, (1824) 1 Car. & P. 545, 171 E.R. 1310. If the plaintiff has previously released the defendant from his promise to marry, there is no action: *Bellamy* v. *Robertson*, *supra*, n. 27, *rev'g.* 7 W.W.R. 567, 7 Sask. L.R. 206 (C.A.); *Reynolds* v. *Jamieson*, (1889) 19 O.R. 235 (Ch. D.); *Lafayette* v. *Vignon*, [1928] 2 W.W.R. 506, 23 Sask. L.R. 47, [1928] 3 D.L.R. 613 (C.A.); if the plaintiff is not ready and willing to marry the defendant, there is no cause of action: *Lafayette* v. *Vignon*, *supra*.

[37] Defences recognized at law are limited. The defences which were available under ecclesiastical law were much broader: *see*, *e.g.*, *Cohen* v. *Sellars*, *supra*, n. 1. These defences included the ground of deadly enmity and unquenchable hatred between the parties affianced, and other grounds based upon just and reasonable cause. In *Cohen*, it was observed, *per* McCardie, J., at 543-4:

> . . . though the ecclesiastical power was great yet it was tempered by a more liberal view than exists [today] with respect to the wider purposes of a legal union between man and woman. In the seventeenth century the law recognized that married happiness depended in large measure on compatibility of temper and on the possession of each party of qualifications for a beneficent union of lives . . . It is obvious . . . that in the seventeenth and eighteenth centuries it was legally permissible for a man or woman to break off an engagement to marry for reasons which, unhappily, would not constitute a valid legal excuse [today].

[38] *See*, *e.g.*, *Young* v. *Murphy*, (1863) 3 Bing. (N.C.) 54, 132 E.R. 329; *Irving* v. *Greenwood*, (1824) 1 Car. & P. 350, 171 E.R. 1226; *Bench* v. *Merrick*, (1844) 1 Car. & K. 463, 174 E.R. 893; *Beachey* v. *Brown*, (1860) E.B. & E. 796 at 802, 120 E.R. 706 at 709, *per* Cockburn, C.J.; *Hall* v. *Wright*, (1859) E.B. & E. 746 at 758, 120 E.R. 688 at 693 *per* Campbell, C.J., Williams, J. at 791, 705, *Grant* v. *Cornock*, *supra* n. 8 *per* Haggarty, C.J.O. at 539, *Lafayette* v. *Vignon*, *supra*, n. 36 *per* Mackenzie, J.A. at 513 W.W.R.; *Jefferson* v. *Paskell*, [1916] 1 K.B. 57 (C.A.) *per* Phillimore, L.J. at 69.

[39] *Supra*, n. 1.

only where the plaintiff was of a loose, immodest or unchaste character. It did not extend, for example, to a "single act of sexual intercourse repented of," since:[40]

> . . . [the standard] to be implied in any particular case depends upon the circumstances of the state of society, its standard of morals, its customs, habits and modes of life, looked at generally and also looked at particularly with regard to locality and to class and to the individuals.

Since the standard by which want of chastity is measured is contemporary morality, the extent to which this defence would be effective today is unclear.

Mental or physical disability is also a defence.[41] It has been suggested that:[42]

> . . . there must be some cases of mental or physical infirmity (as it has been decided that there are cases of moral infirmity) which supervening after the promise, or, I would add, first coming to the knowledge of the party after the promise, will justify him or her in refusing to marry.

The development of an abscess on the breast of the plaintiff,[43] or the plaintiff's impotence,[44] for example, have been held to be valid defences. Insanity of either party occurring after the promise is a defence;[45] the insanity of the plaintiff before the promise is not.[46]

It is uncertain whether a party can rely on his physical disability as a defence. In *Hall* v. *Wright*,[47] the defendant contracted a disease causing bleeding from the lungs and could not engage in sexual intercourse without endangering his life.[48] The plaintiff claimed she was entitled to a husband or damages in lieu and that "the fatal consequence of the marriage to the husband is either immaterial to the wife, or a ground for greater damage, as a widow may get more of her former husband's assets than a wife."[49] It was held that:[50]

> . . . it is no excuse for the breach of promise to marry, that the performance of the conjugal duties would be attended with danger to the defendant's life. Such a state of illness may make it a matter of the greatest prudence on his part to break his contract, and to pay such damages as a jury may award against him for the breach. But . . . it is no legal answer to the action.

This judgment has been severely criticized and its present authority is doubtful.[51]

The courts have viewed with disfavour defences raising incompatibility. It has been held that the plaintiff's bad temper, or use of obscene language is no excuse.[52] Also "slight differences of opinion, frailties of temper, [and] partial disenchantment are not defences."[53] It is immaterial that the parties are better

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[40] *Ibid.* *Per* Beck, J.A. (dissenting in part) at 330-1 W.W.R.

[41] *Lowry* v. *Robins*, (1919) 45 O.L.R. 84 (Ont. S.C.-A.D.); mere belief, even if reasonable, of the plaintiff's illness is not sufficient; *Jefferson* v. *Paskell*, *supra*, n. 38.

[42] *Jefferson* v. *Paskell*, *ibid.* *per* Phillimore, L.J. at 70. In that case, the plaintiff was unable to marry on the appointed day through illness. The court held that the defendant had to give her a reasonable time in which to recover. Pickford, L.J. was of the opinion that a person might have tuberculosis to such an extent as to render her unfit for marriage.

[43] *Atchison* v. *Baker*, *supra*, n. 8.

[44] *Christian* v. *Georgas*, [1939] O.W.N. 136, [1939] 3 D.L.R. 350, *aff'd.* [1939] O.W.N. 340 [1939] 3 D.L.R. 778 (C.A.).

[45] *Liddell* v. *Easton's Trustees*, [1907] S.C. 154 (Scot.).

[46] *Baker* v. *Cartwright*, (1861) 10 C.B. (N.S.) 124, 142 E.R. 397.

[47] *Supra*, n. 38.

[48] Ibid. The excitement of a marriage ceremony may also have been fatal. The defendant did not assist his case by neglecting to tell the plaintiff the reason for his refusal to marry (*see* Williams, J. at 792-793 [E.B. & E.], 705 [E.R.]).

[49] *Ibid.* at 754 [E.B. & E.], 691 [E.R.] *per* Erle, J.

[50] *Albeit by a slim majority*, *per* Crowder, J. at 787 [E.B.& E.], 703 [E.R.].

[51] *See*, *e.g.*, *Gamble* v. *Sales*, (1920) 36 T.L.R. 427 *per* Darling, J.

[52] *Grant* v. *Cornock*, *supra*, n. 8; the plaintiff's gross behaviour may constitute a defence: *see Rose* v. *Chadwick*, *supra*, n. 27.

[53] *Dickie* v. *Curtis*, *supra*, n. 21.

off not married to each other, although incompatibility may reduce the plaintiff's damages.[54]

3. Measure of Damages

While damages for breach of promise are usually awarded in a lump sum, the heads of damage can be roughly separated into two categories: pecuniary and non-pecuniary. The pecuniary heading includes damages to compensate the plaintiff for financial loss incurred in reliance on the promise. It also includes compensation for loss of what the plaintiff would have gained financially if the marriage had taken place.

Non-pecuniary loss includes those items of damage to the plaintiff which cannot be readily calculated in monetary terms. The injury to the plaintiff's feelings is the most common example. This heading also includes punitive or exemplary damages, where the conduct of the defendant warrants sanction.

(a) *Pecuniary Loss*

Where the defendant has broken a promise to marry, the plaintiff may have incurred expense in reliance on the promise being carried out. The plaintiff may have moved,[55] given up a job or business,[56] or changed his or her position in some other fashion. Wedding plans may have been cancelled with resulting expense.[57] These expenses are characterized as special damages. Special damages are recoverable if they flow directly from the breach of promise and were reasonably within the contemplation of the parties when the promise was made. For example, the cost of the trousseau has been held to be recoverable in some cases.[58]

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[54] *Ibid. See also Stuwe* v. *Baron*, *supra*, n. 5. In Gilbert & Sullivan's operetta *Trial By Jury*, the plaintiff, Angelina, and the defendant, Edwin, sing the following duet to the jury:

> DUET.—Plaintiff and Defendant.
> Plaintiff (embracing him rapturously).
>
> I love him—I love him—with fervour unceasing.
> I worship and madly adore;
> My blind adoration is ever increasing,
> My loss I shall ever deplore.
> Oh, see what a blessing, what love and caressing
> I've lost, and remember it, pray,
> When you I'm addressing, are busy assessing
> The damages Edwin must pay!
>
> Defendant (repelling her furiously.)
>
> I smoke like a furnace—I'm always in liquor—
> A ruffian—a bully—a sot;
> I'm sure I should thrash her, perhaps I should kick her,
> I am such a very bad lot!
> I'm not preposssessing, as you may be guessing,
> She couldn't endure me a day;
> Recall my professing, when you are assessing
> The damages Edwin must pay!
> (She clings to him passionately; after a struggle,
> he throws her off into arms of Counsel.)

[55] *See, e.g., Baxter* v. *Lear*, (1975) 23 R.F.L. 342 (Man. Q.B.); *Thomson* v. *McEwen*, *supra*, n. 18., cost of moving and buying new furniture and equipment not allowed because plaintiff moved before she accepted the offer to marry and she still had the use of the goods to the exclusion of the defendant; *Stuwe* v. *Baron*, *supra*, n. 5.

[56] *Baxter* v. *Lear*, *ibid.*—difference in income between jobs in different communities—$1,306.60; *Lafayette* v. *Vignon*, *supra*, n. 36; *Thomson* v. *McEwen*, *ibid.*

[57] *Baxter* v. *Lear*, *ibid.*

[58] *Thomson* v. *McEwen*, *supra*, n. 18, not allowed in *Andronyk* v. *Cox*, *supra*, n. 5, *per* Wetmore, L.J.S.C. at 8, as no evidence that "those purchases were uniquely required for the nuptial bed."; *see Finlay* v. *Chirney*, (1888) 20 Q.B.D. 494 (Eng. C.A.) where the majority did not decide whether the cost of a trousseau might be claimed but Lord Esher, M.R. felt it was unreasonable for the plaintiff to buy a trousseau as she was merely a housekeeper to a farmer and in any event still had the clothes notwithstanding the breach. In Gilbert & Sullivan's *Trial By Jury*, the plaintiff, Angelina's counsel sings:

> Picture, then, my client naming,
> And insisting on the day;
> Picture him excuses framing—
> Going from her far away;
> Doubly criminal to do so,
> For the maid had bought her trousseau!

Where the plaintiff has been seduced under promise of marriage, the expenses of pregnancy and childbirth (lost wages, and medical and hospital expenses) have been held not to be allowable. They do not flow directly from the breach nor are they reasonably within the contemplation of the parties at the time the promise is made.[59]

Damages may be awarded to compensate for various injuries. For example, the court will consider whether the plaintiff's future prospects for marriage have been impaired because of the broken engagement.[60] The plaintiff may have illegitimate children as a result of the relationship,[61] or the plaintiff may have spent several years with the defendant and age has reduced her "marriage marketability." In *Tuttle* v. *Swanson*, Kirke Smith, J., noted:[62]

> The plaintiff has given 15 years of her life to a hit-and-run artist, but one gathers that these years were not entirely unrewarding to her. Whatever prospect of marriage she had at age 40 has been pro tanto diminished, if not extinguished by warranted suspicion of the intentions of the male of the species.

Damages of $2250 were awarded.

The court may award damages for loss of expected financial and social position in order to put the plaintiff in the same position as if the contract had been carried out.[63] One factor the court will consider when making this assessment is the defendant's wealth.[64] In most cases loss of expected financial security has not resulted in generous awards.[65]

(b) *Non-pecuniary Loss*

Courts have occasionally recognized that monetary compensation may be awarded for wounded pride and injury to the plaintiff's feelings and affections.[66] Plaintiffs have claimed damages, usually without success, for embarrassment, emotional hurt,[67] humiliation,[68] and injury to reputation[69] and to health.[70] While the plaintiff's inability to face her family as a result of the broken engagement may be a factor,[71] it has been held that the award should not compensate the plaintiff for the feelings of family and friends.[72]

The conduct of the parties is relevant in assessing damages for non-pecuniary loss. Breaking off the engagement suddenly and without warning may aggravate the plaintiff's wounded feelings.[73] An attempt by the defendant

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[59] *Ewart* v. *Tetzlaff, supra*, n. 13 at 128 *per* McInnis, J.; *cf. Gilmore* v. *Dewar*, (1838) 1 N.S.R. 101 (C.A.).

[60] *Baxter* v. *Lear, supra*, n. 55; *Le Blanc* v. *Wetmore, supra*, n. 5; *Naujokat* v. *Bratushesky, supra*, n. 21; *Henderson* v. *Muncey, supra*, n. 8; *Dickie* v. *Curtis, supra*, n. 21.

[61] *Ewart* v. *Tetzlaff, supra*, n. 13; *Baran* v. *Wilensky*, (1959) 20 D.L.R. (2d) 440 (Ont. H.C.); loss of virtue only: *Berry* v. *Da Costa*, (1866) L.R. 1 C.P. 331, *Millington* v. *Loring*, (1880) 6 Q.B.D. 190 (Eng. C.A.); *Mullen et al.* v. *Whitby*, [1979] 2 A.C.W.S. 154, June 1, 1979, Cromarty, J. (Ont. H.C.), pregnancy and miscarriage.

[62] *Supra*, n. 11 at 59-60.

[63] *Collard* v. *Armstrong*, (1913) 4 W.W.R. 879 (Alta. S.C. *en banc*); *Dickie* v. *Curtis, supra*, n. 21; *Smith* v. *Woodfine*, (1857) 1 C.B. (N.S.) 660, 140 E.R. 272; *Naujokat* v. *Bratushesky, supra*, n. 21; *Berry* v. *Da Costa, supra*, n. 61.

[64] *Collard* v. *Armstrong, ibid.*; *Ewart* v. *Tetzlaff, supra*, n. 13; *Dickie* v. *Curtis, supra*, n. 21; *Berry* v. *Da Costa, supra*, n. 61; *Thomson* v. *McEwen, supra*, n. 18.

[65] *See, e.g., Tuttle* v. *Swanson, supra*, n. 11; *LeBlanc* v. *Wetmore, supra*, n. 5; *Lafayette* v. *Vignon, supra*, n. 36; *Ewart* v. *Tetzlaff, supra*, n. 13; *Henderson* v. *Muncey, supra*, n. 8; *Verhoski* v. *Hunt, supra*, n. 25. In some cases courts have referred to what the spouse would have received on an intestacy or under dependant's relief legislation: *supra*., n. 64; *see also Shaw* v. *Shaw, supra*, n. 18. Where the parties have lived together as man and wife, this measure of damages is not wholly inappropriate. In *Shaw* v. *Shaw, e.g.*, the plaintiff did not learn that her marriage was invalid until after her spouse's death.

[66] *Smith* v. *Woodfine, supra*, n. 63 at 667 per Willes, J.; *Baxter* v. *Lear, supra*, n. 55; *Croll* v. *Edgley, supra*, n. 5.

[67] *Baxter* v. *Lear, ibid.*

[68] *Ibid.*

[69] Recognized but not allowed: *Croll* v. *Edgley, supra*, n. 5; *Baran* v. *Wilensky, supra*, n. 61; *Thomson* v. *McEwen, supra*, n. 18.

[70] Claimed but not allowed: *Croll* v. *Edgley, supra*, n. 5; *Thomson* v. *McEwen, supra*, n. 18.

[71] *Ewart* v. *Tetzlaff, supra*, n. 13; *Millington* v. *Loring, supra*, n. 61.

[72] *Berry* v. *Da Costa, supra*, n. 61; *Bell* v. *Giberson*, (1890) 30 N.B.R. 10 (C.A.).

[73] *Le Blanc* v. *Wetmore, supra*, n. 5.

to injure the plaintiff's character at trial may also increase the plaintiff's entitlement to damages.[74] The plaintiff's conduct can also be relevant. In a recent case, the plaintiff married another person five days after the opening of the trial. Damages of $1 were awarded[75] since the court found that the plaintiff was not in love with the defendant and, therefore, was not to be compensated for hurt feelings.

Examples of conduct of the defendant which might justify an award of exemplary or aggravated damages include seduction under promise of marriage,[76] the transmittal of venereal disease[77] and duplicity.[78] In one case,[79] the defendant married another woman the day after the birth of his second child by the plaintiff. He informed the plaintiff of his marriage while she was still confined. The defendant's insensitive conduct was held to justify an award of exemplary damages. Similarly, deceit may either aggravate the general damages or found a claim for punitive and exemplary damages.[80]

In awarding damages for non-pecuniary loss, the courts appear to distinguish between male and female plaintiffs. Although gender does not determine standing,[81] courts are likely to be less generous to a male plaintiff. In *Brownlee* v. *Partridge*,[82] for example, the male plaintiff successfully brought an action for breach of promise, claiming seduction. The court awarded $5.00 to assuage his wounded feelings.

4. Effect of the Divorce Act and the Family Relations Act

Two statutes could have a significant impact on the common law respecting the action for breach of promise of marriage. They are the *Divorce Act*[83] and the *Family Relations Act*.[84]

The *Divorce Act* was passed by the federal parliament in 1968.[85] This statute sets out several grounds for divorce. In addition to the well-established grounds of adultery and cruelty,[86] which depend upon establishing fault on the part of one spouse, the Act, insofar as it provides for divorce on the grounds of "marriage breakdown"[87] irrespective of fault, constitutes a radical departure from the former law. Subsections 4 (1) (e) and 4 (2) of the *Divorce Act* provide:

> 4 (1) In addition to the grounds specified in section 3, and subject to section 5, a petition for divorce may be presented to a court by a husband or wife where the husband and wife are living separate and apart, on the ground that there has been a permanent breakdown of their marriage by reason of one or more of the following circumstances as specified in the petition, namely:

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[74] *H.* v. *H.*, [1947] 2 W.W.R. 695 (Alta. S.C.); *cf. Burke* v. *Scribner*, (1876) 16 N.B.R. 652 (C.A.); *McGregor* v. *McArthur*, (1856) 5 U.C.C.P. 493 (C.A.); *Collard* v. *Armstrong*, *supra*, n. 63.

[75] *Pavao* v. *Vieira and Belchoir*; *Belchoir* v. *Vieira*, *supra*, n. 4; in Pepperas v. *Le Duc*, (1913) 4 O.W.N. 1208, 11 D.L.R. 193 (Ont. S.C.), it was held that a woman who has married another has no action for breach of promise; *see also Collard* v. *Armstrong*, *supra*, n. 63; *Henderson* v. *Muncey*, *supra*, n. 8.

[76] *Collard* v. *Armstrong*, *supra*, n. 63; *Berry* v. *Da Costa*, *supra*, n. 61; *Ewart* v. *Tetzlaff*, *supra*, n. 13; *Verhoski* v. *Hunt*, *supra*, n. 25; *Morris* v. *Churchward*, (1913) 4 O.W.N. 1008, 10 D.L.R. 191.

[77] *Millington* v. *Loring*, *supra*, n. 61.

[78] Carrying on with another woman at the same time, *see Demitri (aka Niemann)* v. *Niemann and Niemann Holdings Ltd.*, *supra*, n. 5.

[79] *Verhoski* v. *Hunt*, *supra*, n. 25.

[80] Placing a misleading newspaper advertisement is not in itself deceitful, *Stowe* v. *Baron*, *supra*, n. 5; no deceit found where unclear whether defendant purposely led the plaintiff on or just changed his mind six times, *Baxter* v. *Lear*, *supra*, n. 55; but if the defendant had no intention to marry the plaintiff his conduct was deceitful: *Ewart* v. *Tetzlaff*, *supra*, n. 13.

[81] *Brownlee* v. *Partridge*, *supra*, n. 19.

[82] *Ibid.*

[83] R.S.C. 1970, c. D-8.

[84] R.S.B.C. 1979, c. 121.

[85] S.C. 1967-68, c. 24.

[86] *See* R.S.C. 1970, c. D-8, s. 3.

[87] *See ibid.* s. 4.

(e) the spouses have been living separate and apart
    (i) for any reason other than that described in subparagraph (ii), for a period of not less than three years, or
    (ii) by reason of the petitioner's desertion of the respondent, for a period of not less than five years,
immediately preceding the presentation of the petition.

(2) On any petition presented under this section, where the existence of any of the circumstances described in subsection (1) has been established, a permanent breakdown of the marriage by reason of those circumstances shall be deemed to have been established.

A divorce can therefore be obtained, irrespective of fault, once the spouses have lived separate and apart either for three years or, if the petitioner deserted the respondent, for five years. The law therefore recognizes incompatibility as a ground for divorce.

In the recent British Columbia case of *Stuwe* v. *Baron*,[88] Taylor, J., held that the right to obtain a divorce on the grounds of separation or desertion was relevant to an action for breach of promise. The parties in this case met through a newspaper advertisement. The defendant promised to marry the plaintiff, but changed his mind after they lived together for a short time. The court agreed with the defendant's contention that the parties were incompatible and hence the marriage, had it taken place, would have been short-lived.[89] In considering the impact of no-fault divorce, his Lordship held:[90]

> I cannot believe the plaintiff's feelings would have been less injured had the marriage taken place. She would then have been faced both with the misery of a third marriage breakdown and also a three-year wait to regain her freedom.
>
> . . . I find that little assistance can be drawn from principles laid down in the older cases when considering a claim for ordinary general damages. The promise today is a promise of something significantly different from that which was promised in earlier times . . .
>
> Here, the defendant could have kept his promise, married the plaintiff, separated from her soon thereafter, paid her nothing and after three or five years, depending on the circumstances of departure, been free to marry someone else. That is the sort of marriage which the plaintiff has been denied. It does not appear to me that either her pecuniary interests or her feelings have been more injured by the defendant's repudiation than they would have been had he kept his promise.

Notwithstanding that breach of promise was established, the court dismissed the action rather than award nominal damages.[91]

The relative ease with which a divorce may now be obtained in Canada suggests that a fundamental re-assessment of the function of the action for breach of promise may be in order. Even if incompatibility is not a defence to the action, it should be a factor to consider when measuring damages. Loss of the marriage, a social tragedy in upper class Victorian England, is today almost a common event since a divorce may now be obtained on the ground of separation or desertion. Nevertheless, the effect of the *Divorce Act* on the principles governing the action for breach of promise does not appear to have been considered in any other Canadian case.

Amendments to the *Family Relations Act*[92] may also affect the principles which govern damages for breach of promise. Section 43 of the *Family Relations Act* provides that, upon marriage break-up, each spouse is entitled to

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[88] *Supra*, n. 5.

[89] *Ibid.* at 199 D.L.R.

[90] *Ibid.* at 200-1 D.L.R.

[91] *Ibid.* at 203 D.L.R.:

> The claim could, perhaps, be allowed, with nominal damages. But that, I think, might appear a rather insulting and insensitive response to the unhappy human consequences of what was, in truth, a well-intentioned, if ill-advised, attempt of two lonely people to find companionship. I think it more appropriate that the claim be dismissed.

[92] *Supra*, n. 84.

a half interest in family assets. That interest is subject to judicial variation on the basis of fairness.

One of the pecuniary elements of a damage award for breach of promise is the plaintiff's expectation of financial security on marriage. Courts have occasionally considered what the plaintiff would have been entitled to on the death of the promisor.[93] Accordingly the extent of the defendant's estate is a relevant matter in calculating damages. By analogy, the court might now consider relevant evidence of the amount the plaintiff would be entitled to on marital breakup had the marriage taken place. However, if the marriage would have been of short duration, it is unlikely that on a re-apportionment the plaintiff would be entitled to a significant portion of the defendant's estate.

The effect of the *Family Relations Act* was discussed in *Stuwe* v. *Baron*.[94] There the plaintiff was considerably younger than the defendant and in business. The defendant was an old age pensioner. In assessing the pecuniary aspect of the damages for breach, Taylor, J., held:[95]

> It seems extremely unlikely, therefore, that if the marriage had gone ahead she would, on its breakdown, have been awarded any maintenance. Since the defendant has an obvious need to be, and remain, self-supporting, it is also highly unlikely the plaintiff would in that event have been given any share in his house, and he has nothing else of consequence to which she could have laid claim as a "family asset" under the *Family Relations Act*, R.S.B.C. 1979, c. 121.
>
> I conclude, therefore, that the plaintiff is certainly no worse off financially as a result of the breach of promise of marriage than she would have been had the marriage taken place.

It may be argued that entitlement under the *Family Relations Act* is the wrong yardstick by which to measure damages because it is designed to compensate spouses for indirect contributions which enable the family to acquire property. A wife, by being a good homemaker and effectively managing the household finances, may make more money available for the husband to invest. In such a case, the wife, on marital break-up, should be entitled to a share of family assets even if they are held in the husband's name alone. Usually, these considerations do not arise during an engagement.

It is therefore too soon to tell whether the rules for measuring damages for breach of promise will be affected by the *Divorce Act* and the *Family Relations Act*. Each Act has a potential impact on awards of damages for both pecuniary and non-pecuniary loss. The provisions of the *Family Relations Act* might convince courts to enlarge or reduce awards in appropriate cases.[96]

C. Entitlement to Property on the Termination of an Engagement to Marry

Individuals engaged to marry often exchange gifts. If the engagement is broken, who is entitled to those gifts?

No special rules apply to property disputes between engaged couples. The usual rules governing property and gifts apply.[97] Gifts given during an engagement may be absolute or conditional depending on whether they were given in contemplation of marriage. An engagement ring is generally regarded as being given conditional upon the marriage taking place.[98] Since

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[93] *See Shaw* v. *Shaw*, *supra*, n. 18.

[94] *Supra*, n. 5.

[95] *Ibid.* at 199-200.

[96] *Ibid.*

[97] For example, regardless of fault, a gift obtained by the use of undue influence must be returned: *See Zamet* v. *Hyman*, [1961] 3 All E.R. 933 (C.A.); *see also Mayer* v. *Pongracz*, unreported decision of Judge Finlay, Chancery Division, November 20, 1981 (1982) 132 New Law Journal 295. *Cohen* v. *Sellar*, *supra*, n. 101 (Man. Ct. Ct.) at 549. Where one party to the engagement dies, a conditional gift must be returned.

[98] *Jacobs* v. *Davis*, [1917] 2 K.B. 532.

absolute gifts, such as Christmas presents, are generally given irrespective of the contemplated marriage, as a general rule they may be kept regardless of who breaks the engagement.[99]

Where a gift is given conditional upon the marriage, the crucial question is who is at fault. If it was mutually agreed to end the engagement, subject to contrary agreement, gifts made conditional on marriage taking place must be returned.[100] A party who wrongfully broke the engagement or was otherwise to blame for its termination is not entitled to the return of conditional gifts made to the other.[101] Nor may the person who wrongfully calls off the engagement keep conditional gifts. They must be returned.[102] However, the defendant's fault does not entitle the plaintiff to convert the defendant's goods in the plaintiff's possession which were not gifts.[103]

In some cases, fault is irrelevant. Gifts from third parties conditional on the marriage taking place, such as wedding gifts, must be returned to the donor.[104] Where property has been purchased for the intended use of both parties during the marriage, it should be returned to the person who paid for it regardless of fault.[105] Where both parties contributed to the purchase of an item, it would ordinarily be regarded as being held on trust in the proportions in which each of them contributed.[106]

These rules appear to operate fairly. Insofar as they depend upon proving that one party or the other is at fault, however, they have been criticized. In Chapter IV we will consider whether these rules should be revised.

D. Alternative Causes of Action

A number of alternative remedies may be available to a person who has incurred damages as a result of a broken engagement. Parties who have lived together as spouses for a period of not less than two years have mutual rights to maintenance and support under the *Family Relations Act*.[107] Each of the parties who entered into a marriage subsequently declared to be null and void, in addition to rights of maintenance and support is *prima facie* entitled by virtue of the *Family Relations Act* to a half interest in the family assets as a tenant in common,[108] subject to judicial reapportionment on the ground of fairness.[109] The *Family Relations Act* imposes obligations on the parties to support children of the relationship.[110]

Even if the defaulting party dies intestate, the survivor, provided he lived with, and was maintained by, the deceased for a period of not less than two

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[99] *Seiler* v. *Funk*, (1914) 32 O.L.R. 99 (Ont. S.C.-A.D.); *Iliopoulos* v. *Gemas*, (1981) 32 O.R. (2d) 636 (Ont. Ct. Ct.).

[100] *Cohen* v. *Sellar*, *supra*, n. 1.

[101] *Ibid*; *Iliopoulos* v. *Gemas*, *supra*, n. 99; it is sufficient if the defendant is primarily responsible: *see Seiler* v. *Funk*, *supra*, n. 99, where the woman broke the engagement because the man broke his promise to abstain from drink, the man being held "at fault" for the broken engagement.

[102] *Jacobs* v. *Davis*, *supra*, 98; *see also Cohen* v. *Sellar*, *supra*, n. 1 *per* McCardie, J., at 547; *Robinson* v. *Cumming*, (1742) 2 Atk. 409, 26 E.R. 646; *Fortier* v. *Brault*, (1916) 10 W.W.R. 807.

[103] *Iliopoulos* v. *Gemas*, *supra*, n. 99.

[104] *Jeffreys* v. *Luck* (1922) 153 L.T.Jo. 139 cited in P.M. Bromley, *Family Law*, 5th ed. (1976) at 18.

[105] *Seiler* v. *Funk*, *supra*, n. 99. In *Sheppard* v. Robinson [1928] 2 W.W.R 235 (Alta. S.C./A.D.), a car intended for use by the defendant and the deceased was recovered by the deceased's estate.

[106] *Ulrich* v. *Ulrich and Felton*, [1968] 1 W.L.R. 180 (C.A.) *per* Lord Denning at 185. *See* also *Pettit* v. *Pettit*, [1969] 2 W.L.R. 966 at 990 *per* Lord Upjohn; *see Bahrijchuk* v. *Babiuk*, (1969) 68 W.W.R. 293 (Alta. S.Ct.) where parties had agreed that if marriage did not take place the man would get the house. It was held that he could not rely on this clause where he had precipitated the women's refusal to marry by beating her. It should also be noted that there is no presumption of advancement from the man to the woman. *See Clelland* v. *Clelland or McNabb*, (1945) 61 B.C.R. 426 (B.C.C.A.).

[107] R.S.B.C. 1979, c. 121, s. 1, s. 57 and s. 61; *see, e.g., Andronyk* v. *Cox*, *supra*, n. 5; *Kaminsky* v. *Kaminsky*, *supra*, n. 5. In *Sealey (falsely called Bridge)* v. *Bridge*, (1966) 58 D.L.R. (2d) 18 (Ont. H.C.), Wilson, J., awarded a $1500 lump sum in lieu of damages or *quantum meruit* under the *Ontario Matrimonial Causes Act*.

[108] *Supra*, n. 84, s. 43.

[109] *Supra*, n. 84, s. 51.

[110] *Supra*, n. 84, ss. 56 and 61.

years immediately preceding the deceased's death, may apply for maintenance under the *Estate Administration Act*.[111] Similarly an illegitimate child may apply for maintenance from the deceased father's estate and is deemed to be the legitimate child of the deceased mother.[112]

In addition to these rights of maintenance and, in some cases, a share in "family assets," a person jilted by another may be able to assert rights to property pursuant to a constructive trust.[113] Similarly, compensation for services rendered or goods transferred may be had in actions for *quantum valebat* or *quantum meruit*.[114]

Other possible causes of action include the tort of deceit, which may lie if the defendant has deliberately misled the plaintiff in order to gain some monetary advantage.[115] If, unknown to the plaintiff, the defendant was already married, an action for breach of warranty of capacity to marry may be brought against the defendant or his estate.[116] The plaintiff may bring an action for assault, where the defendant's deceit has led the plaintiff to engage in sexual intercourse with him.[117] Lastly, a contract to pay expenses may exist independently of the promise to marry, so that the plaintiff is entitled to recover expenses incurred in reliance on the promise to marry.[118]

While we have not discussed all the possible alternative remedies available to a party to a broken engagement or to a void marriage, we have discussed the principal ones. They appear to provide adequate protection to parties who are engaged to be married, even in the absence of the action of breach of promise of marriage.

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[111] R.S.B.C. 1979, c. 114, ss. 85 and 86.

[112] *Ibid.* *See also* the *Child Paternity and Support Act*, R.S.B.C. 1979, c. 49.

[113] *See, e.g., Pettkus* v. *Becker*, (1981) 117 D.L.R. (3d) 257, 19 R.F.L. (2d) 165 (S.C.C.); *see also* A.J. McClean "Constructive and Resulting Trusts—Unjust Enrichment in a Common Law Relationship—*Pettkus* v. *Becker*," (1982) 16 U.B.C. Law Rev. 155; *Re Spears and Levy, supra*, n. 18; *Demitri (a.k.a. Niemann)* v. *Niemann and Niemann Holdings Ltd., supra*, n. 5; *Andronyk* v. *Cox, supra*, n. 5.

[114] Christine Davies (ed.), *Power on Divorce*, 3rd ed., v. 1, at 277; *see Sheaser* v. *Sheaser*, [1926] 2 W.W.R. 389 (Alta. S.C.-A.D.); *Re Spears and Levy, supra*, n. 18; *Naujokat* v. *Bratushesky, supra*, n. 21; *Newton* v. *Newton, supra*, n. 15; *Rowe* v. *Public Trustee, supra*, n. 12; *cf. Robinson* v. *Shistel*, (1873) 23 U.C.C.P. 114 (Ont. C.A.).

[115] *See, e.g., Graham* v. *Saville*, [1945] 2 D.L.R. 489 (Ont. C.A.); *Beaulne* v. *Ricketts*, [1979] 3 W.W.R. 270, 96 D.L.R. (3d) 550 (Alta. S.C.-T.D.); *Widgery* v. *Dudley*, (1913) 4 O.W.N. 733 (Master in Chambers); *Snarr (Austin)* v. *Austin*, (1978) 6 R.F.L. (2d) 293 (Ont. H.C.); *Mullen et al.* v. *Whitby, supra*, n. 61; *Tschcheidse* v. *Tschcheidse*, (1963) 41 D.L.R. (2d) 138 (Sask. Q.B.); *Baran* v. *Wilensky, supra*, n. 61; *cf. Poloz* v. *Lewicki*, [1958] O.W.N. 94 (C.A.); *Newton* v. *Newton, supra*, n. 15; *Brennen* v. *Brennen*, (1890) 19 O.R. 327 (Q.B.); *Phillips* v. *Phillips*, (1962) 31 D.L.R.(2d) 546 (Ont. H.C.); *Christian* v. *Georgas, supra*, n. 44. *See* H.R. Hahlo, *Nullity of Marriage in Canada—With a Sideways Glance at Concubinage and its Legal Consequences*, 1979 at 31.

[116] *Shaw* v. *Shaw; supra*, n. 18; *see also Kaminski* v. *Kaminski, supra*, n. 5; *Mullen et al.* v. *Whitby, supra*, n. 62, $20,000 damages awarded on several grounds including deceit, breach of promise, assault and apparently breach of warranty; *Newton* v. *Newton, supra*, n. 15, combined with claim for fraudulent misrepresentation and *quantum meruit*, where the court found there was a breach of warranty but that the plaintiff had released her right to sue in a separate agreement; *Tschcheidse* v. *Tschcheidse, supra*, n. 115, $8,000 awarded for breach of warranty and possibly deceit; *Cf. Poloz* v. *Lewicki, supra*, n. 115 where *Shaw* v. *Shaw* was not referred to by the court.

[117] *Beaulne* v. *Ricketts; supra*, n. 115; *Mullen et al.* v. *Whitby, supra*, n. 61; *Snarr (Austin)* v. *Austin, supra*, n. 120; *Graham* v. *Saville, supra*, n. 115; *Naujokat* v. *Bratushesky, supra*, n. 21.

[118] *See, e.g., Munn* v. *Hoahti, supra*, n. 1.

The action for breach of promise of marriage has been severely and exhaustively criticized by law reform agencies, writers and courts.[1] It has been abolished in several jurisdictions.[2] In this chapter, we will examine the arguments for and against abolition of the action.

A. Arguments Against Abolition

The principal argument in favour of the action is that it provides a remedy in some situations which are not covered by other remedies[3] and where it would be unjust to deny compensation.[4] It has been claimed that the action provides a means for recouping expenses and for distributing property.[5] It has also been argued that abolition of the action would force people to take the law into their own hands, since it might deprive them of a legal avenue for retribution in appropriate cases.[6] Lastly, the action has been cited for its deterrent value.[7] It discourages rogues from taking advantage of others.

We do not find these arguments convincing. We feel that alternative remedies make the action for breach of promise of marriage, to a large extent, redundant. Because of these other remedies, abolition of the action would be unlikely to encourage people to take the law into their own hands. With respect to its deterrent value, we are not persuaded that the action significantly deters rogues from taking advantage of others. Rogues are notoriously men of straw unlikely to be deterred by a simple monetary judgment. We doubt whether abolition of the action would result in an increase in the number of people who falsely promise marriage in hope of gaining sexual favours or monetary advantage. It should be remembered that in certain cases seduction under a promise of marriage is a criminal offence,[8] and where the birth of a child results, affiliation proceedings are available for claiming maintenance.[9] These measures provide some deterrence.

B. Arguments for Abolition of the Action

There are a number of arguments in favour of abolishing the action. It has been commonly argued, for example, that the action for breach of promise

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[1] *See, e.g.*, (English) Law Commission, *Breach of Promise of Marriage*, Law Com. No. 26 (1969); Report of the Torts and General Law Reform Committee of New Zealand, *Miscellaneous Actions* (1968) pages 1-5; Newfoundland, *Report of Family Law Study, Project VII, Marriage* (1969); Ontario Law Reform Commission, *Report on Family Law: Part II, Marriage* (1970); Eleventh Report of the Law Reform Committee of South Australia, *Law Relating to Women and Women's Rights* (1970); Scottish Law Commission, Report No. 76, *Report on Outdated Rules in the Law of Husband and Wife*, (March 1982); Ireland, The Law Reform Commission, LRC 1-1981, First Report on Family Law (1981); *Stanard* v. *Bolin*, (1977) 88 Wash. 2d 614, 565 P. 2d 94 (Wash S. Ct.); His Honour Judge H.B. Grant, *Family Law*, 1970 at 3; *Quirk* v. *Thomas*, [1916] 1 K.B. 516 (Eng. C.A.) *per* Swinfen Eady, L.J. at 527, Pickford L.J. at 537; *Hall* v. *Wright*, (1859) [E.B. & E.] 746, 120 E.R. 688 *per* Bramwell, B. at 777-778 [E.B. & E.], 700 [E.R.], Martin, B. at 788 [E.B. & E.], 704 [E.R.], Pollock, C.B. at 795 [E.B. & E.], 706 [E.R.]; *Tuttle* v. *Swanson*, (1972) 9 R.F.L. 59 (B.C.S.C.); *Stowe* v. *Baron*, (1981) 121 D.L.R. (3d) 199, 27 B.C.L.R. 25 (B.C.S.C.); *Cohen* v. *Sellar*, [1926] 1 K.B. 536 at 545; *Munn* v. *Haahti*, (1925) 37 B.C.R. 71 (B.C.S.C.); *Swyripa* v. *Vaculchik*, [1926] 3 W.W.R. 795, [1927] 1 D.L.R. 461 (Alta. S.C.); Hurson, "Domestic Relations—Breach of Promise to Marry: Relic Revised to Exclude Expectation Damages," (1978) 53 Wash.L.R. 751; White, "Breach of Promise of Marriage," (1894) 10 L.Q.R. 135; Feinsinger, "Legislative Attack on 'Heart Balm'," (1935) 33 Mich. L.R. 979; Kopelman, "Breach of Promise to Marry: Connecticut Heartbalm Statute" (1981) 13 Connecticut Law Review 595; Brockelbank, "The Nature of the Promise to Marry—A Study in Comparative Law," (1946) 41 Illinois Law Review 1, 199; Brown, "Breach of Promise Suits" (1929) 77 U. of Penn. L.R. 474; Wright, "The Action for Breach of the Marriage Promise," (1924) 10 Virginia Law Review 361.

[2] England and Wales, *Law Reform (Miscellaneous Provisions) Act 1970*, s. 1; New Zealand, *Domestic Actions Act 1975*, s. 5; Ontario, *The Marriage Act*, 1977, S.O. 1977, c. 42, s. 32 (see now *The Marriage Act*, R.S.O. 1980, c. 256, s. 32; Australia, *Marriage Amendment Act 1976*, No. 209 of 1976, s. 23; South Australia, *Action for Breach of Promise of Marriage (Abolition) Act*, 1971, No. 75 of 1971; Ireland, *Family Law Act* 1981: 18 American states have statutorily modified or abolished the action: *see Stanard* v. *Bolin*, *supra*, n. 1, at 96.

[3] Wright, *supra*, n. 1 at 381.

[4] Scottish Law Commission, *supra*, n. 1 at 4.

[5] Law Reform Committee of South Australia, *supra*, n. 1 at 7.

[6] Law Reform Committee of South Australia, *supra*, n. 1 at 6-7.

[7] Wright, *supra*, n. 1 at 379, 381.

[8] Where the male is 21 or over and the female is under 21, s. 152, *Criminal Code*.

[9] *Child Paternity and Support Act*, R.S.B.C. 1979, c. 49.

provides an excellent opportunity for blackmail.[10] Innocent parties are forced to settle out of court rather than risk damaging publicity.

The potential for abuse inherent in the action was the primary reason for its abolition in several of the United States in the 1930's and 40's.[11] The danger was considered so great that in some jurisdictions it became a crime even to threaten to bring an action.[12]

The action may also inhibit people from withdrawing from unsuitable engagements. Forcing a party who foresees future unhappiness to choose between the unhappy marriage or a lawsuit for damages places him in an invidious position because incompatibility and the likely unhappiness of the couple are not defences to the action.[13] As the Scottish Law Commission stated:[14]

> It is not in the best interests of the parties, nor in the interests of society, that one of the parties should be induced to enter into marriage by the threat of legal action.

It is difficult, of course, to say whether the action has encouraged unhappy marriages.[15] Nevertheless, unless it is believed that people should marry when one of them does not wish to, there appears to be little reason to compel a party who breaches a promise to marry to pay damages unless there is something more blameworthy than a mere refusal. The action is inconsistent with modern attitudes towards marriage and is rooted in the *mores* and practices of Victorian society.

Analytically, the action is inconsistent with modern divorce law. Under the *Divorce Act*,[16] a divorce may now be obtained regardless of fault after a period of separation or desertion.[17] Even where a divorce is obtained by reason of the fault of a party to the marriage, no special action is given to the innocent party for "loss of the marriage." It is anomalous that a breach of the marriage contract itself is attended with less serious consequences than a breach of the agreement to enter into the contract.[18]

The action for breach of promise is also anomalous in that it has the appearance of a contract action but damages are awarded as they would be in a

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[10] *See, e.g., Munn* v. *Haahti*, *supra*, n. 1, at 72; Feinsinger, *supra*, n. 1, at 984; White, *supra*, n. 1 at 141; Kopelman, *supra*, n. 1 at 601; Brockelbank, *supra*, n. 1 at 202; Brown, *supra*, n. 1 at 492, 494-495; Wright, *supra*, n. 1 at 361; *Stanard* v. *Bolin*, *supra*, n. 1 at 96 *per Hamilton, A.J.*; Cretney, *"Law Reform (Miscellaneous Provisions) Act, 1970"*, (1970) 33 Modern L.R. 534 at 534; English Law Commission, *supra*, n. 1 at para. 17, p. 6; Report of the Torts and General Law Reform Committee of New Zealand, *supra*, n. 1 at 3; Ontario Law Reform Commission, *supra*, n. 1 at 3; Newfoundland Report of Family Law Study, *supra*, n. 1 at 13; Scottish Law Commission, *supra*, n. 1 at 2; *Pavlicic* v. *Vogtsberger*, (1957) 390 Pa. 502, 136 A. 2d 127 (Supreme Court of Pennsylvania) at 130-131.

[11] Schlegel, "Breach of Marriage Promise," (1940) 18 Chi-Kent Rev. 198 at 201-202, cited in Brockelbank, *supra*, n. 1 at 603. The preamble for one such "anti-heart balm" or "heart balm" statute provided (s.61-a of the New York *Civil Practice Act*, cited in 1947 New York Law Revision Commission Report at 243):

> The remedies heretofore provided by law for the enforcement of actions based upon alleged . . . breach of contract to marry, having been subjected to grave abuses, causing extreme annoyance, embarrassment, humuliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely the victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment, and such remedies having furnished vehicles for the commission or attempted commission of crime and in many cases having resulted in the perpetration of frauds, it is hereby declared as the public policy of the state that the best interests of the people of the state will be served by the abolition of such remedies.

[12] *See, e.g.*, New York Civil Rights Law §81 (McKinney's Consolidated Laws of New York).

[13] *See, e.g., Stuwe* v. *Baron*, *supra*, n. 1.

[14] *Supra*, n. 1 at 2; *see also* English Law Commission, *supra*, n. 1 at para. 17; Ontario Law Reform Commission, *supra*, n. 1 at 12-13; Report of the Torts and General Law Reform Committee of New Zealand, *supra*, n. 1 at 2; Newfoundland Family Law Study, *supra*, n. 1 at 13; Law Reform Committee of South Australia, *supra*, n. 1 at 6; Brockelbank, *supra*, n. 1 at 202; Kopelman, *supra*, n. 1 at 603; Wright, *supra*, n. 1 at 369; White, *supra* n. at 142; Cretney, *supra*, n. 10 at 534; "The Marriage Amendment Bill 1976," (1976) 50 Aust. L.J. 325 at 327.

[15] *Standard* v. *Bolin*, *supra*, n. 1 at 98.

[16] R.S.C. 1970, c. D-8, s. 4(1)(e).

[17] *Ibid.*, 3 years or 5 years respectively.

[18] *See, e.g., Standard* v. *Bolin*, *supra*, n. 1, *per* Utter, A.J. for the minority at 98-99; Hurson, *supra*, n. 1 at 757; Kopelman, *supra*, n. 1 at 608; Wright, *supra*, n. 1 at 371. *See also* Report of the Torts and General Law Reform Committee of New Zealand, *supra*, n. 1 at 3; Law Reform Committee of South Australia, *supra*, n. 1 at 6; Scottish Law Commission, *supra*, n. 1 at 3.

tort action. Compensation for injured feelings and even punitive damages may be awarded.[19]

It has been argued that, if the action is tried before a jury, because of the wide latitude for awarding damages, the award made may be not only wholly out of proportion to the seriousness of the breach, but inconsistently measured.[20] These concerns exist for any matter considered by a jury but it is thought that an action for breach of promise is particularly susceptible to the weaknesses of trial by jury. Moreover, although the wealth of the defendant is only relevant in assessing the value of the lost marriage, it may colour the jury's total award.[21] Another factor which militates in favour of abolishing the action is that the agreement of two parties to marry is usually not intended by the parties to be a contract and should not be regarded as one.[22] As Bramwell, B., stated in *Hall* v. *Wright*:[23]

> Consider how it is made, and how it is proved; made without formality, usually without witnesses, perhaps without the word itself being used, or any word of contract, an understanding between the parties, rather than a bargain; come to, at least very often, in a state when the feelings are much excited; proved by a variety of acts and conduct which assume the contract to exist. It seems unreasonable to deal with it as with a contract for sale of goods or other business transaction . . .

Similarly, it may be argued that the engagement is essentially a private matter between the parties and the law should not interfere.[24]

Furthermore, the action is anachronistic and discriminatory.[25] It is anachronistic because today the property aspects of marriage are not as significant as they were in former years.[26] Nor are a woman's prospects of marriage necessarily prejudiced by a broken engagement.[27] Her future financial security is not totally dependent on marrying or the type of marriage made. It is discriminatory in practice because the action is rarely brought by men.[28]

Lastly, in many cases, as we have mentioned, abolition of the action for breach of promise would not leave an injured party without a remedy.[29] These alternative remedies are founded not on breach of promise, but on other aspects of conduct which require legal sanction or regulation (for example, to prevent fraud or to provide adequate maintenance). We do not suggest either that alternative remedies are available in every instance in which a remedy is provided by the action of breach of promise of marriage, or that such duplication would necessarily be sufficient reason to abolish the action. We merely observe that other areas of the law provide remedies in similar circumstances, and on more rational bases, than does the action of breach of promise.

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[19] *Quirk* v. *Thomas*, *supra*, n. 1, *per* Swinton Eady, L.J.; Feinsinger, *supra*, n. 1 at 983; Wright, *supra*, n. 1 at 370.

[20] White, *supra*, n. 1 at 141; Feinsinger, *supra*, n. 1 at 983, Brockelbank, *supra*, n. 1 at 10; Kopelman, *supra*, n. 1 at 602, 611; Brown, *supra*, n. 1 at 491.

[21] White, *supra*, n. 1 at 141.

[22] *See, e.g.*, Brockelbank, *supra*, n. 1 at 200, 205.

[23] *Supra*, n. 1 at 777-778 [E.B. & E.], 700 [E.R.].

[24] Report of the Torts and General Law Reform Committee, *supra*, n. 1 at 2; Ontario Law Reform Comission, *supra*, n. 1 at 12; Kopelman, *supra*, n. 1 at 603; White, *supra*, n. 1 at 141; Wright, *supra*, n. 1 at 367; His Honour Judge H.B. Grant, *Family Law*, 1970 at 3. This is also implied by Taylor, J. in *Stuwe* v. *Baron*, *supra*, n. 1 at 203 [D.L.R.].

[25] *Tuttle* v. *Swanson*, *supra*, n. 1 *per* Kirke Smith, J. at 59; Kopelman, *supra*, n. 1 at 600-601.

[26] Kopelman, *supra*, n. 1 at 600-1.

[27] Report of the Torts and General Law Reform Committee of New Zealand, *supra*, n. 1 at 3.

[28] Brockelbank, *supra*, n. 1 at 202; Brown, *supra*, n. 1 at 491; Wright, *supra*, n. 1 at 370.

[29] Wright, *supra*, n. 1 at 382; it is significant that in most modern actions, the claim for breach of promise is only one of several causes of action allegedly by the plaintiff. *See, e.g.*, *Andronyk* v. *Cox*, (1982) 38 B.C.L.R. 15 (B.C.S.C.) (claim for breach of promise, declaration of trust for an interest in the home in the name of the defendant and support under Part 4 of the *Family Relations Act*) and *Demitri (aka Niemann)* v. *Niemann and Niemann Holdings Ltd.*, (1980) F.L.D. 172 (B.C.S.C.) (claim for maintenance for self and child, a resulting or constructive trust in certain property and breach of promise).

CHAPTER IV OPTIONS FOR REFORM

A. Introduction

It is difficult to discern any common thread linking actions brought for breach of promise. The equities vary considerably from case to case. It is useful to keep the diversity of cases in mind when contemplating various options for reform, since different options answer different needs.

Breach of promise cases most commonly arise when a man and woman become engaged and then fall out. In that case neither party's conduct is really blameworthy. We do not think the law should provide a remedy which obliges the party who terminates the engagement to choose between marriage or paying damages. In such a case, however, the parties may have incurred expenses relying upon the promise and there exists no other remedy for recovery of those expenses. A limited right to recover those expenses might be desirable. It is questionable, however, whether damages for hurt feelings or loss of expectations serve any reasonable purpose when neither party is to blame. We discuss below whether it is desirable to retain the action of breach of promise to recover on one or more of the heads of damage for which it currently provides a remedy.

A second situation is the void marriage. The parties enter into what they believe is a valid marriage. Both are unaware that the marriage is invalid. The *Family Relations Act* provides adequate remedies in these cases. Similarly, parties who live together in a so-called common law relationship may acquire rights under the *Family Relations Act*.

A third situation is where the parties enter into a marriage, known to one party to be invalid. In this case, in addition to rights under the *Family Relations Act*, the actions of breach of warranty and deceit are available. There is no specific need, in this case, for the action of breach of promise.

A fourth situation is where one party promises marriage, with no intention of fulfilling his promise, in order to take advantage of the other party. Again, adequate remedies exist to compensate the injured party, primarily in tort for deceit.

The only remedies provided by the action of breach of promise, which are not provided by some other action, are damages for hurt feelings and the recovery of expenses incurred in reliance upon the promise. We shall discuss the desirability of retaining the action for breach of promise to provide remedies for these damages later in this chapter.

B. Legislation in Other Jurisdictions

The action for breach of promise of marriage has been revised or abolished in many jurisdictions. In England, after several earlier attempts at reform, it was abolished in 1970.[1] It has also been abolished in Ontario,[2] Australia,[3] South Australia,[4] New Zealand[5] and Ireland.[6] It has been re-

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[1] *Law Reform (Miscellaneous Provisions) Act 1970*, s.1. For early attempts see (English) Law Commission, *Breach of Promise of Marriage*, Law Com. No. 26 (1969) at 6, para. 14-16; also White, "Breach of Promise of Marriage," (1894) 10 L.Q.R. 135.

[2] *The Marriage Act, 1977*, S.O. 1977, c.42, s.32 (now *The Marriage Act*, R.S.O. 1980, c. 256, s. 32).

[3] *Marriage Amendment Act 1976*, No. 209 of 1976, s. 23.

[4] *Action for Breach of Promise of Marriage (Abolition) Act, 1971*, No. 75 of 1971.

[5] *Domestic Actions Act 1975*, s.5.

[6] *Family Law Act 1981*.

formed or abolished in several of the United States.[7] Reform has also been proposed in Scotland[8] and Newfoundland.[9]

C. The Alternatives

1. Overview

Of the possible approaches to the reform of the law of breach of promise, the alternatives are:

(a) Revising the common law action by prohibiting recovery on one or more of the heads of damage.
(b) Abolishing the action for breach of promise of marriage.
(c) Abolishing the action and prohibiting the use of alternative remedies for the same purpose.

2. Revising the Common Law Action by Prohibiting Recovery on One or More of the Heads of Damage

Under the current law, an injured party may claim special damages for actual pecuniary loss suffered and general damages to compensate for hurt feelings, injury to health, humiliation, embarrassment and anticipated pecuniary loss based on loss of the financial security of the marriage.

In *Stanard* v. *Bolin*,[10] the majority of the Supreme Court of Washington held that, because the action of breach of promise was judge-made, a court could abolish all or part of it. The majority of the court held that the action should be retained for special and general damages but that the recovery for loss of financial expectations should no longer be maintainable. Hamilton, J., for the majority, said:[11]

> Although damages for loss of expected financial and social position more closely resemble the contract theory of recovery than the other elements of damages for breach of promise to marry, we do not believe these damages are justified in light of modern society's concept of marriage. Although it may have been that marriages were contracted for material reasons in 17th Century England, marriages today generally are not considered property transactions, but are, in the words of Professor Clark, "the result of that complex experience called being in love."
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> . . . A person generally does not choose a marriage partner on the basis of financial and social gain; hence, the plaintiff should not be compensated for losing an expectation which he or she did not have in the first place. Further, the breach-of-promise-to-marry action is based on injuries to the plaintiff, and evidence of the defendant's wealth tends to misdirect the jury's attention when assessing the plaintiff's damages towards an examination of the defendant's wealth rather than the plaintiff's injuries.

The majority of the Washington Supreme Court concluded that actual pecuniary loss suffered and general damages for mental anguish, loss of reputation and injury to health should be recoverable, being foreseeable. That general damages are vague and may be incapable of exact quantification did not justify abolition.

We agree that damages for lost financial security should not be recoverable. Marriage does not guarantee either party that a certain level of financial security will be reached or maintained.

We have also concluded that damages for hurt feelings should not be recoverable. In any social relationship there is a possibility that feelings will

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[7] For the states which have abolished or modified the action by statute *see Stanard* v. *Bolin*, (1977) 88 Wash. 2d 614, 565 P. 2d 94 (Wash. S. Ct.) at 95. *Also* for reform by a court *see Stanard* v. *Bolin*, *ibid*.

[8] Scottish Law Commission, Report No. 76 — *Report on Outdated Rules in the Law of Husband and Wife* (1983).

[9] Newfoundland *Report on Family Law Study, Project VII, Marriage* (1969).

[10] *Supra*, n. 7.

[11] *Ibid*. at 97.

be hurt. We doubt whether any policy would support legal intervention in these cases.

There is some justification for allowing special damages for expenses incurred in reliance on a promise to marry. The engaged person may have given up employment, sold a lucrative business, incurred moving or wedding expenses, or sold or bought a house or furniture.[12] Damages in this respect are designed to place the plaintiff in the position he or she would have occupied had the marriage taken place.[13] These expenses would have been incurred even if the wedding had gone ahead as planned. Morover, in some cases, the party incurring expense may have received absolute gifts or other benefits which offset those expenses.[14] In addition, property purchased in contemplation of the marriage might have value for other purposes.[15]

Although a separate statutory scheme for reallocating these expenses is preferable to retention of the action for breach of promise of marriage, we have concluded that neither alternative is desirable.[16] A system of allocating gains and losses was considered by the English Law Reform Commission and rejected because it would be difficult to determine what the actual pecuniary expenses were. The court would be required to unravel the financial dealings of the parties conducted, perhaps, over several years. It is also difficult to determine which expenditures should be included. For example, if A claimed $100 for wedding invitations which could no longer be used, should B be able to set off the cost of airfare for a trip to visit A's parents which would not have been taken if the parties were not engaged? What if B also managed to get in some skiing on the trip? It is difficult to determine whether the calculation should include expenditures not directly related to the engagement. Perhaps A lost $2000 in wages by moving to the city B lives in. Should B be allowed to set off his much more generous Christmas gifts?

In some cases, the tort action of deceit may provide a remedy for these expenses. In many instances, some benefit will remain from the expenditures. Expenses may have been compensated for by other material benefits received during the engagement. There may also be a separate agreement concerning expenses which could be enforced.

The lack of case law on disputes between formerly engaged couples over expenses suggests that usually the loss is insignificant or the parties are able to settle the disputes themselves. We have concluded that these expenses should not be recoverable through the action of breach of promise.

In view of our conclusions that no special head of damage should be preserved by way of a modification of the present action for breach of promise of marriage, it will be readily apparent that we prefer a more radical solution. We therefore turn to the question of abolishing the action.

3. Abolition of the Action of Breach of Promise of Marriage

Abolition of the action for breach of promise has been the most common approach to reform. The English *Law Reform (Miscellaneous Provisions) Act 1970* provides in part:

> 1.-(1) An agreement between two persons to marry one another shall not under the law of England and Wales have effect as a contract giving rise to legal

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[12] White, *supra*, n. 1 at 142; some early English reformers favoured this approach: *see* (English) Law Commission, *supra*, n. 1 at 6, paras. 14-16.

[13] *See, e.g.*, (English) Law Commission, *supra*, n. 1 at 8, para. 23.

[14] *See, e.g.*, *Andronyk* v. *Cox*, (1982) 38 B.C.L.R. 15 (B.C.S.C.): defendant purchased a suit for the plaintiff.

[15] (English) Law Commission, *supra*, n. 2 at 25, citing Report of the Torts and General Law Reform Committee of New Zealand, *Miscellaneous Actions* (1968).

[16] *See, e.g.*, (English) Law Commission, *supra*, n. 1, and Torts and General Law Reform Committee of New Zealand, *supra*, n. 15.

rights and no action shall lie in England and Wales for breach of such an agreement, whatever the law applicable to the agreement.

The New Zealand *Domestic Actions Act 1975* provides:

> 5. (1) No agreement between two persons to marry each other, wherever made, shall be a contract, and the action for breach of promise of marriage is hereby abolished.

In Ontario, *The Marriage Act* provides:[17]

> 32.-(1) No action shall be brought for a breach of promise to marry or for any damages resulting therefrom.

Similar legislation is in force in Australia and South Australia[18] and Ireland.[19] Abolition of the action for breach of promise has also been recommended in Scotland.[20]

In England, a controversy arose because abolition of the action of breach of promise also abolished the action for breach of warranty that the defendant was able to marry.[21] The action for breach of warranty provides a valuable remedy where the claimant is an innocent party to a void marriage.[22]

This additional remedy, however, is no longer needed in British Columbia. Where the error is discovered while both parties are still alive, the wronged party may claim maintenance and a division of family assets under the *Family Relations Act*. Where the error is not discovered until after the other party's death, the *Estate Administration Act* currently provides a remedy where the parties have cohabited for two years or more and the deceased died intestate. In our project on Statutory Succession Rights we have proposed that this remedy be removed in favour of allowing a party to a void marriage to claim for variation of a share in an intestate or testate estate under the *Wills Variation Act*. The constructive trust has also been used as a remedy.[23] Where there has been deceit, an action in tort can be maintained against the promisor or his estate. We think these remedies are adequate.

Following the passage of statutes abolishing actions for breach of promise in the United States, questions arose over the scope of the legislation. Many of the statutes were broadly framed, abolishing "all causes of action for breach of contract to marry."[24] The main questions raised were whether the legislation prevented actions for the recovery of property transferred in contemplation of marriage and whether the legislation barred actions for fraud or deceit.[25] Some courts held that the legislation barred recovery of gifts given in contemplation of marriage regardless of conduct.[26] Other courts held that the legislation abolishing the action for breach of promise, enacted to prevent fraud, should not be used to perpetuate it. In *Pavlicic* v. *Vogtsberger*,[27] for example, the plaintiff sought the return of many gifts and several loans he had

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[17] R.S.O. 1980, c. 256.

[18] *Marriage Amendment Act 1976*. No. 209 of 1976, s. 23; South Australia, *Action for Breach of Marriage (Abolition) Act, 1971*, No. 75 of 1971.

[19] *Family Law Act 1981*.

[20] Scottish Law Commission, *supra*, n. 8.

[21] *See, e.g.*, Thomson, "The End of Actions for Breach of Promise?" (1971) 87 L.Q.R. 158 and Reply by Gower at 314.

[22] Cretney, *"Law Reform (Miscellaneous Provisions) Act 1970,"* (1970) 33 Modern L.R. 534 at 538-539.

[23] *Re Spears and Levy*, (1974) 52 D.L.R. (3d) 146 (N.S.C.A.).

[24] Pennsylvania, *Pavlicic* v. *Vogtsberger*, (1957) 390 Pa. 502, 136 A. 2d 127, cited at 130 (S. Ct. of Pennsylvania).

[25] These issues have been discussed in several articles and notes. *See, e.g.*, Kopelman, "Breach of Promise to Marry: Connecticut 'Heart Balm Statute'", (1981) 13 Connecticut Law Review 595; Joanne Smith, "Domestic Relations: Breach of Contract to Marry: New York *Civil Practice Act*, Article 2-A: Recovery of Antenuptial Gifts"; "Recovery of Gifts Made in Contemplation of Marriage," 1947 New York Law Revision Commission Report 233; Yaffe, "Breach of Promise of Marriage: California *Civil Code*, Section 43.5: Does Not Apply to Action in Tort for Fraud," (1956-57) 4 U.C.L.A. Law Review 114; "Breach of Marriage Promise—Statute Outlawing Breach-of-Promise Suits Does Not Bar Action Based on Fraudulent Promise to Marry," (1957) 70 Harvard Law Review 1098.

[26] *See* Kopelman, *ibid.* at 606.

[27] *Supra*, n. 24.

made to the defendant, who had agreed to marry him. The court held that the plaintiff could recover his property on the ground that:[28]

> It could never be supposed that the Act of 1935 intended to throw a cloak of immunity over a 26-year old woman who lays a snare for a 75-year old man and continues to bait him for four or five years so that she can obtain valuable gifts and money from him under a false promise of marriage.

Some states clarified their Acts to specify when property could be recovered.[29]

Is it desirable to retain an action for fraud or deceit in circumstances where an action for breach of promise might be brought? In California, for example, when it was held that an action in deceit was still available,[30] the California Legislature responded by providing that "A fraudulent promise to marry or to cohabit after marriage does not give rise to a cause of action for damages."[31] Other American courts and commentators have criticized any distinction between an action for breach of promise and an action for fraud based upon a broken promise to marry. The main argument for abolition of both is that the legislation may be circumvented by simply adding an allegation (however unwarranted) of deceit to a breach of promise claim. This has the same potential for inducing a settlement to avoid publicity as has the action for breach of promise.[32] In our opinion the importance of providing a remedy in circumstances of fraud justifies the minimal risk of abuse. Consequently, we have concluded that the action for deceit or fraud, in these circumstances, should continue to be maintainable.

The primary reason for abolishing the action of breach of promise is that an engagement is not commonly viewed as a contract. There may be cases, however, where the parties wish a formal agreement to marry to be binding. For example, one of the parties may have to change his or her position to marry. He or she may live in another country. Giving up a career, leaving friends, moving to their intended's country, would be substantial steps to take in reliance on an unenforceable promise. It may be desirable to permit parties to enter into binding contracts to marry. For example, providing that a contract to marry must be in writing if it is to be enforced in a court of law would ensure that the parties had intended their engagement to have the consequences of a legally binding contract. On the other hand, the parties may have clearly agreed orally that their engagment was a legally binding contract. Enforcing only written agreements to marry is probably undesirable.

We have therefore concluded that no exceptions should be made, and that the action for breach of promise should be abolished.

The Commission recommends that:

1. Legislation should be enacted to provide that no action be brought for a breach of promise to marry or for any damages resulting therefrom.

We received one comment relating to the consequences of not prohibiting all actions based upon a broken promise to marry:

> We understand that you are leaving the actions for deceit, breach of warranty, and breach of trust, constructive or otherwise, in full flower. We understand that you are expressly retaining the action for recovery of gifts given in contemplation of marriage.
>
> We think that your solution leaves a hodge-podge of remedies in the breach of promise situation and that the remedies that are left have no sound foundation in logic, jurisprudence, or social policy.

[28] *Ibid.* at 131.
[29] Kopelman, *supra*, n. 25 at 607.
[30] *Langley* v. *Schumacker*, 46 Cal. 2d 601, 297 P. 2d 977 (1956).
[31] California *Civil Code*, §43.4.
[32] *See, e.g.*, Kopelman *supra*, n. 25, and (1957) 70 Harvard Law Review 1098, *supra*, n. 25 at 1099.

We can see no reason for amending principles of the law of trusts that may apply in these circumstances. Nor do we think the action of deceit should be prohibited since otherwise there would be no remedy for fraud. We have not expressly recommended the abolition of the action for breach of warranty, although the action may not be maintainable once the action for breach of promise is abolished.[33] It does not appear to be used in British Columbia in any event. Lastly, there is no separate action for recovery of gifts given in contemplation of marriage. The law which governs recovery in these circumstances is the law which governs recovery of any conditional gift. While other areas of the law will provide remedies in circumstances where there is a breach of promise of marriage, those remedies are based not upon the breach but upon other aspects of conduct which require legal intervention. While a breach of promise of marriage should not in itself be actionable, other conduct in these circumstances may be blameworthy. In part, our conclusion that the action of breach of promise of marriage should be abolished was based on the consideration that the law provides useful remedies in these circumstances on more rational bases.

Nor do we find the objection to be convincing that a "hodge-podge" of remedies is left in place. These remedies are specific answers to particular problems.

4. Alternatives for Determining Property Rights and Allocating Expenses

Several jurisdictions have developed methods to deal with property and expense questions following abolition of the action for breach of promise. They vary considerably in complexity. Some jurisdictions attempt to codify the principles of unjust enrichment to be applied, or to deal with expenses incurred in contemplation of marriage.

(a) *Ontario*

In Ontario, the common law rules have been revised by prohibiting the courts from considering whether one or the other of the parties was at fault. The Ontario *Marriage Act* provides:[34]

> 33. Where one person makes a gift to another in contemplation of or conditional upon their marriage to each other and the marriage fails to take place or is abandoned, the question of whether or not the failure or abandonment was caused by or was the fault of the donor shall not be considered in determining the right of the donor to recover the gift.

(b) *The English Approach*

The English approach provides for a summary procedure under the *Married Women's Property Act* for questions related to the property of an engaged couple. The rules governing the division of property between married couples are to be applied. The *Law Reform (Miscellaneous Provisions) Act 1970* eliminates any consideration of fault in determining who is entitled to gifts conditional on marriage. As an exception to the law of conditional gifts, it provides that the engagement ring is an absolute gift,[35]

> . . . so as to preserve the right of the wronged woman to throw the ring into the river rather than return it to her former fiancé.

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[33] *Supra*, n. 21.

[34] *Supra*, n. 17.

[35] Cretney, *"Law Reform (Miscellaneous Provisions) Act, 1970,"* (1970) 33 Modern L.R. 534, 536, citing Mr. Leo Abse, M.P.

The presumption that an engagement ring is an absolute gift may be rebutted only by proving a condition, express or implied, that the ring be returned if the marriage did not take place for any reason.

(c) *The New Zealand Approach*

The New Zealand *Domestic Actions Act, 1975*,[36] provides a complex scheme for resolving property disputes after the termination of an engagement. The court is given the right to determine property interests on the general principle of returning the parties to their pre-engagement positions. Fault is not to be taken into consideration. Where property has been received from a third party, who does not claim its return, the courts have a broad jurisdiction to determine such entitlement as may be fair in the circumstances.

Relief is provided where money has been spent for one party's benefit, for example, where the woman buys a trousseau, or where money has been spent or is owing by any person on consumable items from which no benefit is derived (for example, wedding invitations, or catering which has to be cancelled). The action for money had and received is expressly preserved.[37]

(d) *Ireland*

Another complicated scheme has been implemented in Ireland. In 1981, the Law Reform Commission recommended a scheme governing distribution of third party gifts and gifts between the parties. Gifts between the parties, including the engagement ring, were presumed to be conditional unless the marriage was terminated by the death of the donor. Other property acquired would be subject to the rules that applied to married couples. It was also suggested that the court be given the power to make such orders as were just and equitable where one party received a substantial benefit, or incurred a substantial expenditure from which he or she had not benefitted. These recommendations were substantially implemented in the Irish *Family Law Act 1981*.

(e) *American Proposals*

Some American jurisdictions have codified the powers of the court in dealing with the property of the parties. An example is s. 80-b of the *New York Civil Rights Law*:[38]

> §80-b. Nothing in this article contained shall be construed to bar a right of action for the recovery of a chattel, the return of money or securities, or the value thereof at the time of such transfer, or the rescission of a deed to real property when the sole consideration for the transfer of the chattel, money or securities or real property was a contemplated marriage which has not occurred, and the court may, if in its discretion justice so requires, (1) award the defendant a lien upon the chattel, securities or real property for monies expended in connection therewith or improvements made thereto, (2) deny judgment for the recovery of the chattel or securities or for rescission of the deed and award money damages in lieu thereof.

One American author has recently suggested that engagement expenses should be borne equally between the parties on a no-fault basis. They could then be set off against conditional gifts which should otherwise be returned.[39]

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[36] No. 53.

[37] Under s. 8(3) of this legislation, the New Zealand High Court recently awarded a man $18,000 out of his fiancee's estate for the amount he had spent for support and maintenance of his fiancee and her mother over a long engagement: *Young* v. *New Zealand Insurance Co. Ltd.*, High Court, Auckland, 18 December 1981 (A. No. 1031/79; M. N. 1110/79.) Sinclair, J., reported in [1982] N.Z. Recent Law 53.

[38] McKinney's Consolidated Laws of New York, Annotated Civil Rights Law, Vol. 8.

[39] Hurson, "Domestic Relations—Breach of Promise to Marry: Relic Revised to Exclude Expectation Damages," (1978) 53 Wash. L.R. 751 at 760.

(f) *Variation of Settled Property*

Problems that might arise from gifts exchanged by people engaged to be married, or made to them because they are to be married, might be handled by amending section 54 of the *Family Relations Act*.[40]

Section 54 of the *Family Relations Act* provides that a court may vary the terms of a "marriage settlement:"

> **Variation of marriage settlements**
>
> **54.** (1) This section applies to an ante nuptial or post nuptial settlement that is not a marriage agreement under this Part.
>
> (2) The Supreme Court may, on application, not more than 2 years after an order for dissolution of marriage, for judicial separation or declaring a marriage null and void, inquire into an ante nuptial or post nuptial settlement affecting either spouse and, whether or not there are children, make any order that, in its opinion, should be made to provide for the application of all or part of the settled property for the benefit of either or both spouses or a child of a spouse or of the marriage.
>
> (3) The Supreme Court may, on application, where circumstances warrant, extend the period during which an application may be made or power exercised under this section.

The Act does not define what is meant by a "marriage," "ante-nuptial" or "post-nuptial" settlement. A separation agreement has been held to be a "post-nuptial settlement."[41]

In *Thomas* v. *Thomas*,[42] section 54 was contrasted to section 51 of the *Family Relations Act*,[43] another section of that Act which empowers the court to vary agreements made by spouses with respect to their property:

> Firstly, I consider that on a proper construction of [section 54] it only applies after there has been "an order for dissolution of marriage, for judicial separation or declaring a marriage null and void".
>
> Secondly, the court may only deal with the "settled property", that is the property covered by the settlement which is the subject of inquiry.
>
> In contrast, Section 51 applies whether or not there has been any order for dissolution, judicial separation or nullity. An application can be made under the section at any time during the subsistence of the marriage or up to two years after an order for dissolution, separation or nullity. After such two year period any party applying would not fall within the definition of spouse in Section 2.
>
> Thirdly, under Section 51 the court is not limited to property covered by the marriage agreement but " . . . the court may order that other property not covered . . . .by the marriage agreement . . . of one spouse be vested in the other spouse."
>
> Another distinction to be made between the two sections is the extent of the court's discretion. In *Divinsky* v. *Divinsky*, 1971, 2 R.F.L. 372, McIntyre, J. (as he then was), in dealing with the then Section 14 of the Supreme Court Act (a predecessor to Section 54) and the issue of the court's discretion stated at page

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[40] The following is a diacussion of that section, and is based upon our work in Working Paper No. 35, "Statutory Succession Rights."

[41] *Thomas* v. *Thomas*, (Unreported B.C.S.C. decision) Vancouver Registry No. 5936/D037933, March 17, 1981; *Divinsky* v. *Divinsky*, (1971) 2 R.F.L. 372 (B.C.S.C.); *Worsley* v. *Worsley*, (1869) L.R. 1 P.D. 648; *Horoshok* v. *Horoshok*, (1965) 53 W.W.R. 482, 54 D.L.R. (2d) 615 (Man. Q.B.).

[42] *Ibid*.

[43] Section 51 provides as follows:

> **Judicial reapportionment on basis of fairness**
>
> **51.** Where the provisions for division of property between spouses under section 43 or their marriage agreement, as the case may be, would be unfair having regard to
>
> (a) the duration of the marriage;
>
> (b) the duration of the period during which the spouses have lived separate and apart;
>
> (c) the date when property was acquired or disposed of;
>
> (d) extent to which property was acquired by one spouse through inheritance or gift;
>
> (e) the needs of each spouse to become or remain economically independent and self sufficient; or
>
> (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,
>
> the Supreme Court, on application, may order that the property covered by section 43 or the marriage agreement, as the case may be, be divided into shares fixed by the court. Additionally or alternatively the court may order that other property not covered by section 43 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

375, "I am of the opinion that in proceedings of this kind the trial judge has full discretion in the matter which he must exercise judicially according to the well established judicial principles . . . ".

In dealing with the court's discretion under Section 51, the courts of this province in several cases, for example, *Margolese* v. *Margolese* (1980) 2 W.W.R. 723, held that the proper approach to Section 51 is to be found in the decision of Galligan, J. in *Silverstein* v. *Silverstein*, 1 R.F.L. (2nd) 239 (Ontario High Court), wherein he dealt with similar Ontario legislation and held that the court, in determining the fairness of the division of property under that section had to have regard to the statutory criteria set forth in the section granting the court the power to make such division.

The court's discretion under Section 54 would appear then to be broader in that it would not be subject to the statutory constraints of Section 51.

Section 54 is based upon section 5 of the English *Divorce and Matrimonial Causes Act*.[44] That section is as follows:

As to marriage settlements of parties after final decree of nullity of marriage.

5. The court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the applicaton of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the court shall seem fit.

While traditionally the term "settlement" referred to the establishment of some kind of trust for the benefit of one or both spouses,[45] its usage in section 54 does not appear to be restrictively interpreted.[46]

The term "settlement" in section 54 and in the equivalent English provision has been given a wide interpretation.[47] It is neither wise nor possible to give it a precise meaning[48] beyond that it is an arrangement made by one spouse with or for the benefit of the other *in the character of spouse*.[49] Section 5 of the English Act was enacted two years after the *Divorce Act* of 1857, to meet the difficulty that arose where, although the marriage had been dissolved, the parties were still bound by agreements respecting their property made before or during the marriage.[50] It would appear, therefore, that when it was enacted, it was not intended to vary agreements between spouses made in anticipation of the dissolution of their marriage (i.e., separation agreements). It was intended to remedy injustices flowing from agreements respecting division of property before or during the course of the marriage, made by parties who expected the marriage to endure. In that sense, settlements made in expectation of a marriage that never takes place are functionally equivalent to the kinds of settlements the section was intended to govern.

The courts have been able to construe the section widely because of the very general terms used ("ante-nupti al," "post-nuptial") to create the power to vary. A post-nuptial settlement has been construed to include virtually any agreement between the spouses before or during the course of the marriage, provided it was made on the spouse in his or her character as a spouse. The particular form does not matter.[51]

Section 54, in its current form, may be expressed broadly enough to be used to vary settlements made in expectation of a marriage that does not take place. The section, as judicially interpreted, applies to settlements made to

[44] 22 & 23 Vict., c. 61.
[45] *Duncan* v. *Duncan (No. 2)*, [1950] 1 W.W.R. 1003 (B.C.C.A.).
[46] *Thomas* v. *Thomas*, *supra*, n. 41.
[47] *Bosworthick* v. *Bosworthick*, [1927] P. 64 (C.A.).
[48] *Melvill* v. *Melvill and Woodward*, [1930] P. 159, (C.A.).
[49] *Supra*, n. 47 and 48.
[50] *Supra*, n. 47 at 69.
[51] *Prinsep* v. *Prinsep*, [1929] P. 225.

someone in their character as spouse. Since an ante-nuptial settlement is made to someone before marriage, "spouse" probably has a meaning wide enough to embrace someone engaged to be married. The jurisdiction conferred under the *Divorce and Matrimonial Causes Act* depended upon the making of a final decree of nullity of marriage or dissolution of marriage. Under section 54, the references to marriage dissolution are only to establish a limitation period. It is unclear whether it is open to parties who never marry to apply under section 54, although *Thomas* v. *Thomas* suggests that an order for variation may only be made on marriage dissolution.

Amendment of section 54, to provide the courts with a flexible jurisdiction to vary entitlement to property, may be desirable. For example, property of significant value may be settled on one party to the engagement by another, which, technically, was not made conditional on marriage, although it was made because the parties were to be married. In those cases a statutory jurisdiction to determine entitlement to the property might be useful.

The English Law Reform Commission proposed that:

> In determining questions relating to the property of either or both the parties to an agreement to marry that has terminated, the court should apply the same principles as those applied to determine questions concerning the property of husband and wife.

This approach is probably not desirable in British Columbia, since the matrimonial property provisions of the *Family Relations Act* are very generous. Moreover, division of matrimonial property is linked to claims for maintenance. At least, in current practice, the order a court makes respecting the division of matrimonial property will affect the order it makes for maintenance. Since maintenance is generally not an issue between people engaged to be married, the courts may encounter analytical problems applying principles developed to govern the division of family assets between spouses to engaged persons. Moreover, this is probably an inappropriate approach to extract parties from improvident engagements, since the result, in all likelihood, would be contrary to their expectations when they become engaged.

The narrower approach of amending section 54 to permit applications on the termination of an engagement is more desirable than extending current principles respecting division of matrimonial property to persons engaged to be married. That might be accomplished by adding the following provision to section 54:

> Where an agreement to marry is terminated, either or both of the parties to the agreement may, within two years of the termination, apply under section 54 of the *Family Relations Act* for variation of property settled on either or both of the parties in contemplation of the marriage.

In the Working Paper we invited comment on whether it was desirable to revise section 54 of the *Family Relations Act* to govern property settled on engaged people in contemplation of a marriage that did not take place. None of our correspondents favoured that approach.

(g) *Recommendations*

We are not convinced that this aspect of the law requires clarification. In most cases, the current law deals adequately with problems that arise concerning property acquired by, or gifts exchanged between, a man and woman because of their engagement. That was also the conclusion in Australia when they abolished the action of breach of promise.[52] Moreover, court discretion to reallocate property conferred in expectation of marriage may override the

[52] Also South Australia and it appears to be the approach of the Newfoundland Family Law Study.

express intentions of the parties. The current approach taken by the law attempts to give effect to the parties' intentions when the gifts were made. Lastly, recent developments in the use of the constructive trust make that a valuable tool for resolving property disputes.

The Australian *Marriage Amendment Act 1976* amended the *Marriage Act 1961-73* to provide:[53]

> IIIA. (1) A person is not entitled to recover damages from another person by reason only of the fact that that other person has failed to perform a promise, undertaking or engagement to marry the first-mentioned person.
>
> (2) This section does not affect an action for the recovery of any gifts given in contemplation of marriage which could have been brought if this section had not been enacted.

We have concluded that this approach should be adopted in British Columbia.

The Commission recommends that:

2. Legislation abolishing the action for breach of promise should not affect an action for the recovery of any gifts given in contemplation of marriage which could have been brought if legislation based upon Recommendation 1 had not been enacted.

D. Consequential Amendments

1. The Small Claim Act and County Court Act

The action for breach of promise of marriage is referred to in several British Columbia statutes. The *Small Claim Act*[54] provides:

> 3. The court has no jurisdiction
>
> (a) where the title to land comes into question;
> (b) for malicious prosecution, for libel or slander;
> (c) for seduction or breach of promise of marriage; or
> (d) against a judge for anything done by him in the execution of his office.

A similar provision exists in the *County Court Act*,[55] which provides:

> 28. Except as is otherwise provided by this Act, the County Courts shall not have jurisdiction in an action
>
> (a) for any malicious prosecution or any libel or slander;
> (b) for seduction or breach of promise of marriage; or
> (c) against a Provincial Court judge for anything done by him in the execution of his office.

The references to breach of promise should be deleted from these sections.

The Commission recommends that:

3. The words "or breach of promise of marriage" be deleted from section 3 (c) of the Small Claim Act, *R.S.B.C. 1979, c. 387 and section 28 (b) of the* County Court Act, *R.S.B.C. 1979, c. 72.*

2. The Evidence Act

The *Evidence Act*[56] provides:

> 7. (1) The parties to any action, suit, petition or other matter of a civil nature in any of the courts of the Province, and their wives and husbands, are, except as hereinafter excepted, competent as witnesses, and compellable to attend and give evidence in the same manner as they would be if not parties to the proceedings, or

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[53] No. 209 of 1976, s. 23.
[54] R.S.B.C. 1979, c. 387.
[55] R.S.B.C. 1979, c. 72.
[56] R.S.B.C. 1979, c. 116.

wives or husbands of the parties, but no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony is corroborated by some other material evidence in support of the promise.

The reference to breach of promise in section 7 should be deleted.

The Commission recommends that:

4. Section 7 (1) of the Evidence Act, *R.S.B.C. 1979, c.116 be amended by deleting ", but no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony is corroborated by some other material evidence in support of the promise."*

E. Application

To prevent problems of application arising, legislation abolishing the action for breach of promise of marriage should clarify whether it applies to a breach whenever it occurs, or only where the breach occurs after the legislation is enacted. In our opinion, there is no reason to permit an action to be brought on a promise of marriage, or a breach of it, which occurred before legislation abolishing the action is implemented. Actions commenced before enactment of this legislation, however, should not be affected by it.

The Commission recommends that:

5. (a) Recommendation 1 should apply whether or not the promise or breach occurred before legislation which implements it comes into force.

(b) Notwithstanding (a), an action commenced before legislation enacting Recommendation 1 comes into force may be continued as if the legislation had not been enacted.

CHAPTER V CONCLUSION

A. General

In this Report we have examined the action for breach of promise. Fundamental changes in the law of divorce, the existence of adequate alternative remedies in those cases where the parties to a broken engagement require protection, and the fact that the action for breach of promise is often used to wreak revenge or blackmail, suggest that the action should be abolished. Moreover, while at one time it may have been desirable to compensate a party to a broken engagement for hurt feelings and lost status, today it is unlikely that any policy is served by awarding damages in these cases. An engagement is often only a means of testing the parties' compatibility, and if an engagement is broken, a party with hurt feelings is probably in a better position than if an unhappy marriage had taken place. Lastly, sanctions which are necessary to govern commercial arrangments are inappropriate for agreements to marry made between people who are probably unaware that the commitments they have made are viewed at law as binding contracts. For these reasons we have concluded that the action for breach of promise of marriage should be abolished.

B. List of Recommendations

We have made the following recommendations in this Report:

1. Legislation should be enacted to provide that no action be brought for a breach of promise to marry or for any damages resulting therefrom. **(Page 27)**

2. Legislation abolishing the action for breach of promise should not affect an action for the recovery of any gifts given in contemplation of marriage which could have been brought if legislation based upon Recommendation 1 had not been enacted. **(Page 33)**

3. The words "or breach of promise of marriage" be deleted from section 3(c) of the Small Claim Act, *R.S.B.C. 1979, c. 387 and section 28(b) of the* County Court Act, *R.S.B.C. 1979, c. 72.* **(Page 33)**

4. Section 7(1) of the Evidence Act, *R.S.B.C. 1979, c. 116 be amended by deleting ", but no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony is corroborated by some other material evidence in support of the promise." (Page 34)*

5. (a) Recommendation 1 should apply whether or not the promise or breach occurred before legislation which implements it comes into force.

(b) Notwithstanding (a), an action commenced before legislation enacting Recommendation 1 comes into force may be continued as if the legislation had not been enacted. **(Page 34)**

C. Acknowledgments

The Commission wishes to express its gratitude to a number of persons who have contributed to this Report.

We would like to thank those who responded to the Working Paper which preceded this Report. Law reform, to be effective, requires the attention of the

community. While the subject of this Report was largely uncontroversial, the thoughtful submissions we received were helpful in preparing this Report.

We would also like to express our gratitude to Ken Mackenzie, a former member of the Law Reform Commission. Mr. Mackenzie participated in the development of the Working Paper and in the deliberations on our final recommendations. His term as a Commissioner expired only shortly before the contents of this report were settled.

The Commission also wishes to acknowledge the work of Gail Black, former Legal Research Officer to the Commission, who was responsible for much of the research upon which the Working Paper and this Report are based, and to our Counsel, Thomas G. Anderson, who prepared this Report.

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